The Central Law Journal.

ST. LOUIS, APRIL 11, 1890.

The Senate Judiciary Committee has reported favorably on the bill, recommended by the American Bar Association, in the interest of the relief of the Supreme Court of the United States, the effect of which is to make the United States District Courts, courts of original jurisdiction, and the Circuit Courts, courts of appeal. It is expected that this will enable the supreme court to catch up with its docket which is now three years behind. Besides the relief which this will bring to the supreme court, it will undoubtedly prove beneficial to practitioners in the lower federal courts, the system of which is cumbersome and in many respects useless. A paper prepared by Walter B. Hill, Esq., and used as an argument before the Senate Judiciary Committee, gives data upon this subject, which is of interest, and shows in what respect the change in the federal court practice is needed. It appears therefrom that, as a matter of fact, one judge presides alone in nine-tenths of all cases in the lower federal courts, and that in nine-tenths of more than half of them he is the final arbiter of the rights of the parties. One judge sits in the district court-room and has jurisdiction over certain cases, and, when he has finished the work in there, he walks into the next room and has jurisdiction which he has refused in the other room. In a case recently tried in the Missouri circuit, a clerk of the district court had the record made up at an expense of $500, and sent to himself as clerk of the circuit court. That case was tried by the judge of the district court, who thereafter sat alone as judge of the circuit court, passed on the objections to his own rulings, and the question of his own errors and all the other questions which he decided when the case was tried. It is to get rid of these useless proceedings, and to relieve the supreme court that the bill was introduced. Two-thirds of the cases which the supreme court has to hear are not federal cases, most of them being simply questions between citizens of different States. Under the bill as now proposed, these cases will all originate in the district court, be appealed to the circuit court, and there finally decided. Cases involving strictly federal questions will be appealable directly to the supreme court from the court of original jurisdiction. All other cases from these courts will go to the intermediate appellate court, and will there be finally heard, except in those instances where the harmony of federal jurisprudence or the importance of the question involved may require a final decision on appeal by the supreme court. The circuit courts will then consist of three judges, and instead of sitting in several different places in each State, they will sit in one place in each State once a year to decide cases appealed to them. From a study of the argument of Mr. Hill referred to, it is apparent that the change proposed will prove valuable.

The irony of fate was never more strikingly illustrated than in the decision by the Supreme Court of Mississippi, which practically sets free Mr. Slugger Sullivan and imprisons Mr. Slugger Kilrain. That court reversed the conviction of Sullivan on account of the defectiveness of the indictment in not averring that the fight was public, and that Kilrain fought Sullivan. The indictment did not charge that Sullivan and Kilrain fought against each other, but that Sullivan in pursuance of previons appointment to engage in a prize-fight with Kilrain for a sum of money, did unlawfully engage in a prize-fight with Kilrain, and did enter a ring and beat, strike and bruise the said Kilrain. But it was regarded as fatal in failing to charge that while John slugged Jake, Jake did not hit back. All of which seems to show that the legal responsibility which a prize-fighter in Mississippi assumes attaches only when he fails to keep up his end of the fight.

The article of E. L. Russell, Esq., on the "Supreme Court and Interstate Commerce," which appears on page 302 of this issue, in reply to one on the same subject by Hon. Chas. A. Culberson, which appeared in the American Law Review, is in line with the discussion lately opened by the New York Evening Post, as to the propriety of an amendment to the federal constitution, clothing congress with jurisdiction over the whole subject of commerce, and abolishing the distinction between

State and interstate commerce. The provision of the Constitution of the United States, which declares that congress shall have power to regulate commerce among the several States, has already received an application extending far beyond what the profession in the first half of this century ever contemplated. A few years' experience has confirmed the wisdom of conferring this power upon the federal government. But it has also shown, that under the changed conditions of the country the distinction which was so easy to make half a century ago between commerce within a State, and commerce between different States is rapidly becoming impracticable and justice to carriers, as well as a sound public policy now seems to indicate that the same power which regulates traffic of the railroads between different States must regulate to some extent, at least, competing traffic of all railroads within each State. The question is suggested whether this enlargement of the law must come from express amendment of the constitution, or whether it can develop itself in the line of judicial decisions. The whole distinction between State and interstate traffic is somewhat artificial and false. The attempt to regulate the one without the other is impossible of success in the long run, and our body of law, as it now stands, affords us no relief. It is certainly unquestionable that the grant of power to regulate commerce between States carries with it power to do whatever is necessary to effect that result with justice. The question then whether the regulation of any part of railroad traffic within a State has become necessary as an incident to the regulation of commerce between States will be a fair and no doubt unavoidable question for the judiciary whenever congress shall assume to exercise the power. Indeed, the dissenting opinions of Justices Bradley and Harlan in the very recent case of Louisville, N. O. & T. Ry. Co. v. State of Mississippi, before the Supreme Court of the United States, illustrates the tendency of the judicial mind in the direction indicated. The time is fast coming when this question must be considered and determined.

NOTES OF RECENT DECISIONS.

The effect of the omission of children from the provisions of a will, was considered by the Supreme Court of the United States in Coulam v. Doull, 10 S. C. Rep. 253. There it was held that under Act Utah (Comp. Laws, § 694), which provides that, "when any testator shall omit to provide in his or her will for any of his or her children, * * * unless it shall appear that such omission was intentional, such child * * * shall have the same share in the estate of the testator as if he or she had died intestate," where children of a testator living at the time his will is executed are omitted therefrom, evidence *aliunde* the will is admissible to show that such omission was intentional. The act of Utah having been copied from a statute of California, which was itself taken from a statute of another State, the supreme court is not bound by the construction of the statute made by the courts of California. Chief Justice Fuller who delivered the opinion, after tracing the source of the statute under consideration to Massachusetts whose statute reads "unless it shall appear that such omission was intentional," says:

How appear? Evidently *aliunde* the will. If it must appear upon the face of the will that the omission was intentional, the words inserted in the statute were superfluous; for, if it did so appear, the child could not take, notwithstanding the provision that in case of omission it should take, inasmuch as the latter provision was only inserted to give the omitted child a share, not against the intention of the testator, but because of the presumption of an oversight. Hence, in Wilson v. Fosket, 6 Metc. 400, the court held that, under the statute as amended, evidence *dehors* the will was admissible to establish that the omission was intentional; and such is the settled law of Massachusetts. Converse v. Wales, 4 Allen, 512; Buckley v. Gerard, 123 Mass. 8; Ramsdill v. Wentworth 101 Mass. 125. In the latter case the court said: "The operation of the statute is peculiar, but there is no violation under it of the rules of evidence. The only issue is whether provision was omitted in the will by design, and without mistake or accident. Parol evidence is admitted, although the result may change or modify the disposition of the testator's estate. The will is used to show that there is no legacy under it; and, however the issue may be established, there is no conflict with its terms."

In Bancroft v. Ives, 3 Gray, 367, the statute of Massachusetts was held to apply to children born after the making of the will, and before the death of their father. The argument was pressed that the language, "omit to provide in his will," necessarily meant, and should be confined to, children living at the time of making the will. This argument was regarded by Chief Justice Shaw as plausible, but not sound, because, as a man's will is ambulatory until his decease, the time to which the question of omission applied

was the time of the testator's death. If, therefore, he had then made no provision by his will, the case of the statute arose, for he had made a will, but left a child without having made any provision for such child.

By the Utah statute, however, specific provision is made for children born after the making of the will, and also for children in being, but omitted when the will is made. Children born after the making of the will, but before the decease, inherit, unless it appears from the will that the testator intended that they should not. And this applies to posthumous children. Mr. Jarman lays it down that marriage and the birth of a child, conjointly, revoked a man's will, whether of personal or real estate, these circumstances producing such a total change in the testator's situation as to lead to a presumption that he could not have intended a disposition of property previously made to continue unchanged. But this effect is not produced where there is a provision made for both wife and children by the will itself (Kenebel v. Scrafton, 2 East, 530); or by a previous settlement providing for both (1 Jarm. Wills, *123, *125). Revocation, treated as matter of presumption merely, was thought, in Brady v. Cubitt, 1 Doug. 31, open to be rebutted by parol evidence, and this is guardedly conceded by Chancellor Kent in Brush v. Wilkins, 4 Johns Ch. 506, and by Mr. Greenleaf (2 Ev. § 684). But, as is stated in a note to that section, the doctrine that the presumption is not conclusive has been overruled, upon great consideration, in the cases of Marston v. Roe, 8 Adol. & E. 14, and Israell v. Rodon, 2 Moore, P. C. 51, in the former of which it was among other things, resolved, that "where an unmarried man, without children by a former marriage, devises all the property he has at the time of making his will, and leaves no provision for any child of a future marriage, the law annexes to such will the tacit condition that, if he afterwards marries, and has a child born of such marriage, the will shall be revoked;" and that "evidence not amounting to proof of republication, cannot be received in a court of law to show that the testator meant his will to stand good, notwithstanding the subsequent marriage and birth of issue; because these events operate as a revocation by force of a rule of law, and independent of the testator." The subject is regulated in this country by the statutes of the several States and territories, marriage alone working revocation under some, and both marriage and birth of issue being required under others; while subsequently born children, unprovided for, are allowed to take, unless a contrary intention appears. But the provision we are considering concerns the children in being when the will is made. As to the children born after death, or the making of the will, the reason why the intention to omit them should appear on the face of the will is obvious. It is the same as that upon which the doctrine of revocation rests,—the change in the testator's situation. But this reason loses its force, so far as children living when the will is made are concerned; and this explains the marked difference between the sections of the statute before us applicable to the two classes. The statute raises a presumption that the omission to provide for children or grand-children living when a will is made is the result of forgetfulness, infirmity, or misapprehension, and not of design; but this is a rebutable presumption, in view of the language employed, which negatives a taking contrary to an intentional omission, and at the same time leaves undefined the mode by which the affirmative purpose is to be established. Legal presumptions drawn by the courts, independently of or against the words of an instrument, may be, in some instances, repelled by extrinsic evidence, and this statutory presumption of an unexpressed intention to provide may be rebutted in the same way. Under § 12, a pretermitted child is entitled to no share if it has had an equal proportion by way of advancement; but it is not contended that this fact must necessarily appear from the will when that is not required by statute. Yet proof of advancements and of intentional omission alike defeat the claimant. The rule as to patent and latent ambiguities, so far as analogous, sustains the same conclusion. Where a devise is, on the face of it, clear and intelligible, yet from external circumstances an ambiguity arises as to which of two or more things, or of two or more persons, the testator referred to, it being legally certain that he intended one or the other evidence of his declarations, of the instructions given for his will, and of other circumstances of like nature, is admissible to determine his intention.

The will in this case is entirely unambiguous. The testator's intention was that his wife should have the property. There being children at the time of the execution of the will, an ambiguity may be said to have been created, by operation of the statute, as to their having been intentionally omitted, which ambiguity evidence of the character named at once removed. Children so situated do not set up title under the will, but under the statute. The will is used to establish that they have no legacy or devise under it. Then the inquiry arises whether the testator intended to omit them. Evidence that he did, does not conflict with the tenor of the will. It simply proves that he meant what he said. Instead of tending to show the testator's real purpose to have been other than is apparent upon the face of the will, it confirms the purpose there indicated. The fact of the existence of children when a will is made is proven *dehors* the instrument; and since, under the statute, that evidence opens up a question as to the testator's intention, which, but for the statute, could not have arisen, and which by the statute is not required to be determined by the will, we cannot perceive why the disposal of it should be so limited.

An unusual question in the law of principal and agent was before the Supreme Court of Illinois in Baird v. Shipman, 23 N. E. Rep. 384. It was there held that an agent who has complete control of a house belonging to an absent principal, and who lets the house in a dangerous condition, promising at the time to repair it, is responsible to a third person injured by an accident caused by want of such repair. The court in affirming, uses the language of the appellate court, saying:

An agent is liable to his principal only for mere breach of his contract with his principal; but he must have due regard to the rights and safety of third persons. He cannot in all cases find shelter behind his principal. If, in the course of his agency he is intrusted with the operation of a dangerous machine to guard himself from personal liability, he must use proper care in its management and supervision, so that others, in the use of ordinary care, will not suffer in life, limb, or property. Suydam v. Moore, 8 Barb. 358; Phelps v. Wait, 30 N. Y. 78. It is not his contract with the principal which exposes him to, or protects him from, liability to third persons, but his common-

law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency; nor can its breach be excused by the plea that his principal is chargeable. Delaney v. Rochereau, 34 La. Ann. 1123. If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use a reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot escape this duty by abandoning its execution midway, and leaving things in a dangerous condition, by reason of his having so left them without proper safeguards. Osborne v. Morgan, 130 Mass. 102. A number of authorities charged the agent, in such cases, on the ground of misfeasance, as distinguished from non-feasance. Mechem, in his work on Agency, § 572, says: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between non-feasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them, because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is non-feasance. Misfeasance may involve, also, to some extent, the idea of not doing, as where the agent while engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances,—does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing; but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law, as a responsible individual, in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation." To the same effect are Lottman v. Barnett, 62 Mo. 159; Martin v. Benoist, 20 Mo. App. 263; Harriman v. Stowe, 57 Mo. 93; Bell v. Josselyn, 3 Gray, 309. A case parallel to that now in hand is Campbell v. Sugar Co., 62 Me. 552, where agents of the Portland Sugar Company had the charge and management of a wharf belonging to the company, and rented the same to tenants, agreeing to keep it in repair. They allowed the covering to become, old, worn, and insecure, by means of which the plaintiff was injured. The court held the agents were equally responsible to the injured person with their principals. Wharton, in his work on Negligence, § 535, insists that the distinction, in this class of cases, between non-feasance and misfeasance can no longer be sustained; that the true doctrine is that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such thing, though the hurt is remotely due to the agent's negligence, the reason being that the casual relation between the agent and the person hurt is broken by the interposition of the principal as a distinct center of legal responsibilities and duties, but that, even where there is no such interrupting of causal connection, and the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury. The rule, whether as stated by Mechem or Wharton, is sufficient to charge appellants with damages, under the circumstances disclosed in this record. They had the same control of the premises in question as the owner would have had if he had resided in Chicago, and attended to his own leasing and repairing. In that respect appellants remained in control of the premises until the door fell upon the deceased. There was no interruption of the causal relation between them and the injured man. They were, in fact, for the time being, substituted in the place of the owner, so far as the control and management of the property was concerned. The principle that makes an independent contractor, to whose control premises upon which he is working are surrendered, liable for damages to strangers caused by his negligence, although he is at the time doing the work under contract with the owner (Whart. Neg. § 440), would seem to be sufficient to hold appellants. The owner of cattle who places them in the hands of an agister, is not liable for damages committed by them while they are under control of the agister. It is the possession and control of the cattle which fix the liability; and the law imposes upon the agister the duty to protect strangers from injury by them. Ward v. Brown, 64 Ill. 307; Ozburn v. Adams, 70 Ill. 291.

A question of implied covenants in the lease of a furnished house, came before the Court of Appeals of New York in Franklin v. Brown, 23 N. E. Rep. 126. There it was held that a letting of a furnished house for a year does not raise an implied covenant against noxious gases which render the house uninhabitable during part of the year, which gases originated outside the demised premises, and were unknown to the lessor when the lease was executed. The court says:

But it is argued that the letting of household goods for immediate use raises an implied warranty that they are reasonably fit for the purpose, and that, when the letting includes a house furnished with such goods, the warranty extends to the place where they are to be used. This position is supported by the noted English case of Smith v. Marrable, 11 Mees. & W. 5, which holds that, when a furnished house is let for temporary residence at a watering place, there is an implied condition that it is in a fit state to be habited, and that the tenant is entited to quit upon discovering that it is greatly infested with bugs. This case has been frequently discussed, and occasionally criticised. It was decided in 1843, yet during that year it was distinguished and questioned by two later decisions of the same court. Sutton v. Temple, 12 Mees. & W. 52; Hart v. Windsor, *Id.* 68. It was approved and followed in 1877 by Wilson v. Finch Hatton, L. R. 2 Exch. Div. 336, in which, however, there was an important fact that did not appear in the earlier case, as before the lease was signed there was a representation made in behalf of the landlord that she believed "the drainage to be in perfect order," whereas it was in fact defective, and the contract was promptly rescinded on this account. The principle that there is an implied condition or covenant in a lease that the property is reasonably fit for the purpose for which it was let, as laid down in Smith v. Marrable, has been frequently questioned by the courts of this country, and has never been adopted as the law of this State. Edwards v. Railroad Co., 98 N. Y. 248; Howard v. Doolittle, 3 Duer, 475; Carson v. Godley, 26 Pa. St. 117; Dutton v. Gerrish, 9 Cush. 89; Chadwick v. Wooodward, 13 Abb. N. C. 441; Coulson v. Whiting, 14 Abb. N. C. 60; Sutphen v. Seebass, *Id.* 67; Meeks v. Bowerman, 1 Daly, 99. We have been referred to no decision of this court involving the application of that principl

to the lease of a ready-furnished house, and it is not necessary to now pass upon the question, because the case under consideration differs from the English cases above mentioned in two significant particulars: (1) It involves a lease for the ordinary period of one year, instead of a few weeks or months during the fashionable season. (2) The cause of complaint did not originate upon the leased premises, was not under the control of the lessor, and was not owing to his wrongful act or default. It was simply a nuisance arising in the neighborhood, but neither caused nor increased by the house in question. Hence we are not called upon in this case to decide whether a lease of a furnished dwelling contains an implied covenant against inherent defects either in the house or in the furniture therein, but simply whether the lease under discussion contains an implied covenant against external defects, which originated upon the premises of a stranger, and were unknown to the lessor when he entered into the contract.

It is uniformly held in this State that the lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor covering that subject. As was said by the learned general term when deciding this case: "The tenant hires at his peril, and a rule similar to that of *caveat emptor* applies, and throws on the lessee the responsibility of examining as to the existence of defects in the premises, and of providing against their ill effects." 53 N. Y. Super. Ct. 479. In Cleves v. Willoughby, 7 Hill, 83, 86, Mr. Justice Beardsley, speaking for the court, said: "The defendant offered to show that the house was altogether unfit for occupation, and wholly untenantable. The principle on which this offer was made, however, cannot, I think, be maintained. There is no such implied warranty on the part of the lessor of a dwelling house as the offer assumes. It is quite unnecessary to look at the common-law doctrine as to implied covenants and warranties, or to its modification by statute. 3 Rev. St. 594. That doctrine has a very limited application, for any purpose, to a lease for years, and in every case has reference to the title, and not to the quality or condition, of the property. The maxim *caveat emptor* applies to the transfer of all property, real, personal, and mixed, and the purchaser generally takes the risk of its quality and condition, unless he protects himself by an express agreement on the subject." O'Brien v. Capwell, 59 Barb. 504, and see Edwards v. Ry. Co., 98 N. Y. 249. * * * These quotations illustrate the strictness with which the courts have refused to imply covenants on the part of the lessor as to conditions under his control. What sound reason, then, is there for claiming that the law will imply a covenant as to conditions not under his control, and with reference to which neither lessor nor lessee can reasonably be supposed to have contracted, as they knew nothing about them? The fact that personal property was in part the subject of the lease can have no bearing upon this question, because neither the furniture, nor the place provided for its use, was the cause of the unpleasant odors. They were not a part of the leased property, either real or personal, but were independent of it in origin, and accidental in their effect. If smoke from a neighboring manufactory had blown through the windows, or gas had escaped from a leaky main in the street and entered the house, could the lessee have abandoned the premises, or have called upon the lessor to respond in damages? If any nuisance had existed in the vicinity without the landlord's agency or knowledge, but which materially lessened the value of the e ase, upon whom would the loss fall? These questions suggest the danger of departing from the established rule as to implied covenants with reference to the condition of leased real property, simply because personal property is included in the lease.

An interesting case on the subject of mutual societies and the law governing changes of beneficiary by members thereof, came before the United States Circuit Court for Michigan, in Supreme Conclave Royal Adelphia v. Cappella, 41 Fed. Rep. 1. It was there determined that in cases of policies of insurance or benefit certificates issued by mutual benefit societies, the beneficiary has no vested interest in the certificate until the death of the insured member. Up to this time the insured may change his designation of beneficiary at will, and against the consent of such beneficiary. The general rule that the insured is bound to make such change of beneficiary in the manner pointed out by the policy and by-laws of the association is subject to three exceptions: (1) If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. (2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is actually issued, he dies, a court of equity will treat such certificate as having been issued. Brown, J., says:

In making such change of beneficiary, however, the insured is bound to do it in the manner pointed out by the policy and the by-laws of the association, and any material deviation from this course will invalidate the transfer. Thus, if the certificate provides that no assignment shall be valid unless approved by the secretary, an assignment without such approval will be invalid. Harman v. Lewis, 24 Fed. Rep. 97, 530. So, if it be provided that such change must be made on a prescribed form or blank, the signature to which shall be attested before a notary, and the change entered upon the books, an assignment to a creditor as collateral security, not made upon the prescribed blank, and of which the association had no notice until after the death of the member, was held to be fatally defective. Association v. Brown, 33 Fed. Rep. 11. So, where the certificate required every surrender to be in writing, attested by the reporter under the lodge seal, it was held that a conditional surrender of the same by the holder, not to take effect until after his death, and not made in the presence of or attested by

such lodge reporter, was invalid. Supreme Lodge v. Nairn, 60 Mich. 44, 26 N. W. Rep. 826. See, also, Wendt v. Legion of Honor, 72 Iowa, 682, 34 N. W. Rep. 470; Elliott v. Whedbee, 94 N. C. 115; Mellows v. Mellows, 61 N. H. 137; Highland v. Highland, 109 Ill. 366. So, if the by-laws fix definitely the manner of changing the beneficiary by his action during his life, an attempt to divert the benefit by will has usually been held to be abortive. Holland v. Taylor, 111 Ind. 121, 12 N. E. Rep. 116; Stephenson v. Stephenson, 64 Iowa, 534, 21 N. W. Rep. 19; Insurance Co. v. Miller, 13 Bush, 489; Vollman's Appeal, 92 Pa. St. 50; Renk v. Herrman Lodge, 2 Dem. Sur. 409; Daniels v. Pratt, 143 Mass. 216, 10 N. E. Rep. 166. There are, however, three exceptions to this general rule, requiring an exact conformity, with the regulations of the association:

(1) If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. This naturally follows from the fact that, having no vested interest in the certificate during the life-time of the assured, he has no right to require that the rules of the association, which are framed alone for its own protection and guidance, are not complied with. Martin v. Stubbings, 126 Ill. 387, 18 N. E. Rep. 657; Splawn v. Chew, 60 Tex. 532; Manning v. Ancient Order, 5 S. W. Rep. 385; Society v. Lupold, 101 Pa. St. 111; Brown v. Mansus, 5 Atl. Rep. 768; Knights of Honor v. Watson, 15 Atl. Rep. 125; Byrne v. Casey, 70 Tex. 247, 8 S. W. Rep. 38; Titsworth v. Titsworth, 20 Pac. Rep. 213. The case of Wendt v. Legion of Honor, 72 Iowa, 682, 34 N. W. Rep. 470, appears upon its face to lay down a different rule, but upon examination it will be seen that the change was attempted to be made by a paper which the insured called his last will, but which was no will in law; and the court held that, the interest of the beneficiary having become vested by the death of the insured, they had acquired rights which could not be cut off, except in the manner prescribed in the contract. This case, evidently, has no application to a change made prior to the death of the insured.

(2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. Thus, in the case of Grand Lodge v. Child, 38 N. W. Rep. 1, the insured made his betrothed the beneficiary, and subsequently lost his certificate. His beneficiary having married another, he made a statement of the loss, and applied for a reissue of the certificate, making his son the beneficiary. His application was refused. The rules of the organization required the change to be indorsed on the original certificate, but, by the advice of the officers, he attempted to make the change of beneficiary by giving a power of attorney to another to collect the amount which should accrue under the certificate. It was held that such acts constituted an equitable change of beneficiary, and that the son was entitled to the fund. The court held that the insured had done all that he could, and all that he was required in equity to do, to change the donee of the certificate. * * *

(3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued. The case of Association v. Kirgin, 28 Mo. App. 80, is an illustration of this exception. In this case, the insured, having met with a fatal accident, called a friend, and requested him to take his certificate to the association and surrender it, pay the fee of fifty cents, and request them to issue a new one, payable to his wife. This was done, and a minute of the transaction was made on the records of the association for that day. On the following day the insured died. It was held that in doing this he had done all that the laws of the order required to be done on his part in order to have a new certificate; that his right to make the change was absolute, and that the association had no right to refuse his request; and, further, that the fact that the certificate was issued after his death was immaterial, since the certificate was not the right itself, but merely the evidence of the right. See, to the same effect, Mayor v. Association, 2 N. Y. Supp. 79; Supreme Lodge v. Nairn, 60 Mich. 44, 26 N. W. Rep. 826; Kepler v. Supreme Lodge, 45 Hun, 274. The case of Ireland v. Ireland, 42 Hun, 212, is distinguishable from these in the fact that the insured made no written request for a change, as required by the rules, but merely delivered the certificate to a friend, telling him he wanted it changed. This was manifestly insufficient.

THE SUPREME COURT AND INTERSTATE COMMERCE.

There appeared in the January-February issue, of the *American Law Review* a very able and instructive article, written by the Hon. Charles A. Culberson, of Dallas, Texas, on the subject, "The Supreme Court and Interstate Commerce."

Mr. Culberson states, or rather claims, that there is a prevailing opinion among the lawyers of the country, that the supreme court has been vacillating in its opinions upon the question under discussion. He then proceeds critically and discriminatingly to examine most of the important decisions of the supreme court, bearing upon the subject. By comparing the decisions, he clearly sustains the charge of uncertainty and vacillation.

It is conclusively demonstrated by Mr. Culberson, both by reason and the best considered authorities, that the power of congress, under the commercial clause of the constitution, over interstate commerce, is exclusive, and that the States have no reserve power over the same. No logical reasoner will dissent from this conclusion.

The result of his examination is thus stated by Mr. Culberson: "The necessary and inevitable result of such construction is to invite and sanction congressional usurpation.

It enables congress, not only to exercise its constitutional function, but to do more."

As previously stated, this conclusion is not sustained by a majority of the decisions of the supreme court applicable to the subject under discussion. In most of the cases where the supreme court has held that congress and the State had concurrent power, it has been at the expense of the exclusive constitutional power of congress, and conceding a constitutional power to the States that they do not possess.

Mr. Culberson accurately stated the true doctrine, when he said, "there is no middle ground on this subject." The power of congress is exclusive if the subject-matter of contention is interstate commerce, and, if not, the power of State is exclusive. The question always to be determined by the court is the subject-matter involved in the controversy, interstate commerce, or internal and domestic commerce of the State. If it is ascertained to be the former, the power of congress is exclusive, if the latter, the power of the State is exclusive.

Mr. Culberson failed to examine and discuss one of the leading decisions of the supreme court bearing on this question. The case alluded to, is the Farmers' Loan & Trust Company v. Stone.[1]

The most satisfactory and accurate rule for construing and applying the commercial clause of the constitution was laid down in the case last cited. It was said by Mr. Chief Justice Wait, who delivered the opinion of the court: "Precisely all that may be done, or all that may not be done, it is not easy to say in advance. The line between the exclusive power of congress, and the general powers of the State, in this particular, is not everywhere distinctly marked, and it is always easier to determine when a case arises, whether it falls on the one side or the other, than to settle in advance the boundary, so that it may be in all respects strictly accurate."

It may be assumed that no lawyer, who has carefully and thoughtfully investigated this question, will dissent from this rule of construction and the method of applying the constitutional power of congress.

One party alleges in a litigated case, that the subject-matter of the controversy constitutes interstate commerce, and therefore falls within the exclusive power of congress; his adversary denies that the subject of contention is interstate commerce, and that therefore it falls within the exclusively reserved power of the State. The issue being thus presented, both parties proceed to introduce their evidence in support of their respective claims, which serve to explain the nature of the transaction, the character of the transportation, the point of reception, and the point of destination. From the information thus furnished, the court is enabled to intelligently and accurately determine whether the commerce, the subject of the controversy, "falls on one side of the line or of the other." When the pleadings and the facts in any given case are thus brought to the attention of the court, it will not have any difficulty in applying the constitutional power of congress, so admirably and aptly defined by Mr. Justice Lamar in the case of Kidd v. Pearson:[2] "The power expressly conferred upon congress to regulate commerce is absolute and complete in itself, with no limitations other than are prescribed in the constitution; is to a certain extent exclusively vested in congress, so far free from State action; is co-extensive with the subject on which it acts, and cannot stop at the external boundary of the State, but must enter into the interior of every State whenever required by the interest of commerce with foreign nations, or among the States."

Mr. Culberson has fallen into another error in his article, wherein he classes the decision in the case of Smith v. Alabama[3] as "supporting the doctrine of an exclusive power in congress over subjects national in character and concurrent in local matters." From a careful examination of the decision in this case, it will be readily seen that the error is not altogether the fault of Mr. Culberson, but the true fault lies at the door of the supreme court, as there are parts of this decision inconsistent and conflicting with other parts. No system of reasoning has yet been discovered whereby the doctrines announced and the conclusions reached, in the case of Smith v. Alabama, can be reconciled with the reasoning, doctrines and conclusions, stated in the cases of Wabash, etc.

[1] 116 U. S. 307.

[2] 128 U. S. 1.

[3] 124 U. S. 465.

R. R. Co. v. Illinois,[4] Robbins v. Taxing District of Shelby County,[5] and Fargo v. Michigan.[6] This is somewhat surprising in view of the fact that the *personnel* of the court was the same when all these cases were decided. The error, however, Mr. Culberson has fallen into in respect to the case of Smith v. Alabama, *supra*, is found in the following declaration: "The case undoubtedly supports the doctrine * * * that the power of congress is concurrent with that of the State in local matters." Upon a careful examination of this case, it will be found that the declaration of Mr. Culberson is not sustained. In the first part of the decision in the case of Smith v. Alabama, among other things, it is said, "As the regulation of commerce may consist in abstaining from prescribing positive rules for its conduct, it cannot always be said that the power to regulate is dormant, because not affirmatively exercised. And when it is manifest that congress intends to leave that commerce, which is subject to its jurisdiction, free and unfettered by any positive regulations, such intention would be contravened by State laws, operating as regulations of commerce, as much as though these had been expressly forbidden. In such cases, the existence of the power to regulate commerce in congress has been construed to be not only paramount, but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States."

This is a clear and unequivocal declaration by the court in this case, that the power of congress is exclusive upon all interstate commerce. Further on in the opinion, however, the following doctrine at variance with that above just quoted is announced. "But for the provisions on the subject found in the local law of each State there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce then, in the absence of laws passed by congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relations of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation and prescribe the rights and duties which it implies, then there is and can be no law that does until congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law which until displaced covers the subject."

It will be observed that the court, in its decision in Smith v. Alabama, treated only of foreign and interstate commerce. In other words, in the latter part of this decision quoted, the court admitted that the State could legislate and prescribe rules for the regulation and government of interstate commerce, which would be valid until displaced by the action of congress. It has been shown, however, that in the first part of the decision, the court declared "the power of congress over interstate commerce to be not only paramount but exclusive, so as to withdraw the subject as the basis of legislation altogether from the States."

Further on in this decision the court said: "It would, indeed, be competent for congress to legislate upon the subject-matter of the Alabama statute, and to prescribe the qualifications of locomotive engineers for employment by carriers engaged in foreign or interstate commerce. It has legislated upon a similar subject by prescribing the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States while engaged in commerce among the States, * * * and such legislation is justified on the ground that it is incident to the power to regulate interstate commerce."

It will be seen by the statement of the facts in this case, that Smith, the locomotive engineer, was handling and driving a locomotive engine, exclusively engaged in pulling a train devoted to interstate commerce. If congress had the constitutional power to legislate upon the subject-matter involved in the controversy in Smith v. Alabama, and to prescribe the qualifications of locomotive engineers engaged in interstate commerce, as

[4] 118 U. S. 557.
[5] 120 U. S. 489.
[6] 121 U. S. 243.

was admitted and declared by the court in its opinion, then the power of congress was as absolute and exclusive as the power of the State is over internal and domestic commerce. The supreme court admitted in its decision that under the facts, that the subject-matter of the the controversy fell within the constitutional power of congress under the commercial clause, yet yielded to the jurisdiction of Alabama until congress should act upon the question and displace the power of Alabama. If congress had the constitutional power over the subject-matter involved in the litigation, then the State of Alabama had no power to enforce the provisions of the act drawn in question against Smith the engineer. On the other hand, if the State had the constitutional power to enforce the provisions of the act against Smith, under the facts stated and admitted, then congress had no power over the subject-matter. It was not at all necessary for the court to declare the act drawn in question unconstitutional. It could have declared that the provisions of the act could not be enforced against Smith the engineer under the admitted facts of the case. Mr. Justice Bradley dissented from the opinion of the court, and in consequence thereof maintained his consistency upon this question.

It is therefore seen that the subject-matter drawn into controversy in the case of Smith v. Alabama was not local but national in character, and also national in its practical operation. The subject-matter involved in the contention was, and is one, that demands a uniform rule and system covering the entire Union of States, and therefore, under the constitution, congress alone has the power to legislate upon it. The fact that congress has not legislated upon this question, is in no sense any legal justification for the State of Alabama to enforce the provisions of the act in question upon any locomotive engineer, in a case similiar in its facts and circumstances to that of Smith v. Alabama.

Both the federal and State courts should give full force and effect to the exclusive power of congress, when the subject-matter falls within its jurisdiction, and when not, they should give full force and effect to the reserved powers of the States.

Mobile, Ala. E. L. RUSSELL.

QUALIFICATIONS OF VOTERS — CONSTITUTIONAL LAW—RELIGIOUS PRACTICES.

DAVIS V. BEASON.

Supreme Court of the United States, February 3, 1890

1. Rev. St. Idaho, §§ 501, 504, which provide that no person "who is a bigamist or polygamist, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, * * * or to enter into what is known as plural or celestial marriage, or who is a member of any order * * * which teaches, advises, counsels, or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order * * * or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this territory," and require every person desiring to register as a voter to take an oath that he does not belong to such an order, are valid, and not unconstitutional as being a "law respecting an establishment of religion."

2. The statute of Idaho is not rendered nugatory by Act Cong. March 22, 1882 (22 St. 31), which declares that "no polygamist, bigamists, or any person cohabiting with more than one woman * * * in any territory * * * shall be entitled to vote at any election held in any such territory * * * or be eligible for election or appointment to, or be entitled to hold, any office or place of public trust," etc., in any such territory, as this does not cover the same subject.

Appeal from the third judicial district of the territory of Idaho.

In April, 1889, the appellant, Samual D. Davis, was indicted in the district court of the third judicial district of the territory of Idaho, in the county of Oneida, in connection with divers persons named, and divers other persons whose names were unknown to the grand jury, for a conspiracy to unlawfully pervert and obstruct the due administration of the laws of the territory, in this: That they would unlawfully procure themselves to be admitted to registration as electors of said county of Oneida, for the general election then next to occur in that county, when they were not entitled to be admitted to such registration, by appearing before the respective registrars of the election precincts in which they resided, and taking the oath prescribed by the statute of the State, in substance as follows: "I do swear (or affirm) that I am a male citizen of the United States, of the age of twenty-one years, (or will be on the 6th day of November, 1888;) that I have (or will have) actually resided in this territory four months, and in this county for thirty days, next preceding the day of the next ensuing election; that I have never been convicted of treason, felony, or bribery; that I am not registered or entitled to vote at any other place in this territory; and I do further swear that I am not a bigamist or polygamist; that I am not a member of any order, organization, or association which teaches, advises, counsels, or encourages its members, devotees, or other person, to commit the

crime of bigamy or polygamy, or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or association, or which practices bigamy, polygamy, or plural or celestial marriage as a doctrinal right of such organization; that I do not and will not, publicly or privately, or in any manner whatever, teach, advise, counsel, or encourage any person to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a religious duty or otherwise; that I do regard the constitution of the United States, and the laws thereof, and the laws of this territory, as interpreted by the courts, as the supreme laws of the land, the teachings of any order, organization, or association to the contrary notwithstanding, so help me God,"—when, in truth, each of the defendants was a member of an order, organization, and association, namely, the Church of Jesus Christ of Latter-Day Saints, commonly known as the "Mormon Church," which they knew taught, advised, counseled, and encouraged its members and devotees to commit the crimes of bigamy and polygamy as duties arising and resulting from membership in said order, organization, and association, and which order, organization and association, as they all knew, practiced bigamy and polygamy, and plural and celestial marriage as doctrinal rites of said organization; and that, in pursuance of said conspiracy, the said defendants went before the registrars of different precincts of the county, (which are designated,) and took and had administered to them respectively the oath aforesaid. The defendants demurred to the indictment, and, the demurrer being overruled, they pleaded separately not guilty. On the trial which followed, on the 12th of September, 1889, the jury found the defendant Samuel D. Davis guilty as charged in the indictment. The defendant was thereupon sentenced to pay a fine of $500, and, in default of its payment, to be confined in the county jail of Oneida county for a term not exceeding 250 days, and was remanded to the custody of the sheriff until the judgment should be satisfied. Soon afterwards, on the same day, the defendant applied to the court before which the trial was had, and obtained a writ of *habeas corpus*, alleging that he was imprisoned and restrained of his liberty by the sheriff of the county; that his imprisonment was by virtue of his conviction, and the judgment mentioned and the warrant issued thereon; that such imprisonment was illegal; and that such illegality consisted in this: (1) That the facts in the indictment and record did not constitute a public offense, and the acts charged were not criminal or punishable under any statute or law of the territory; and (2) that so much of the statute of the territory which provides that no person is entitled to register or vote at any election who is "a member of any order, organization, or association which teaches, advises counsels, or encourages its members, devotees, or any other person, to commit the crime of bigamy or polygamy or any other crime defined by law, as a duty arising or resulting from membership in such order, organization, or which practices bigamy or polygamy, or plural or celestial marriage as a doctrinal rite of such organization," is a "law respecting an establishment of religion," in violation of the first amendment of the constitution, and void. The court ordered the writ to issue, directed to the sheriff, returnable before it at 3 o'clock in the afternoon of that day, commanding the sheriff to have the body of the defendant before the court at the hour designated, with the time and cause of his imprisonment, and to do and receive what should then be considered concerning him. On the return of the writ, the sheriff produced the body of the defendant, and also the warrant of commitment under which he was held, and the record of the case showing his conviction for the conspiracy mentioned and the judgment thereon. To this return, the defendant, admitting the facts stated therein, excepted to their sufficiency to justify his detention. The court, holding that sufficient cause was not shown for the discharge of the defendant, ordered him to be remanded to the custody of the sheriff. From this judgment the defendant appealed to this court. Rev. St. § 1909.

Mr. Justice Field, after stating the facts as above, delivered the opinion of the court.

On this appeal our only inquiry is whether the district court of the territory had jurisdiction of the offense charged in the indictment, of which the defendant was found guilty. If it had jurisdiction, we can go no further. We cannot look into any alleged errors in its rulings, on the trial of the defendant. The writ of *habeas corpus* cannot be turned into a writ of error to review the action of that court. Nor can we inquire whether the evidence established the fact alleged, that the defendant was a member of an order or organization know as the "Mormon Church" called the "Church of Jesus Christ of Latter-Day Saints," or the facts that the order or organization taught and counseled its members and devotees to commit the crimes of bigamy and polygamy, as duties arising from membership therein. On this hearing we can only consider whether, these allegations being taken as true, an offense was committed of which the territorial court had jurisdiction to try the defendant. And on this point there can be no serious discussion or difference of opinion, Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women, and to debase man. Few crimes are more pernicious to the best interests of society, and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind. If they are crimes,

then to teach, advise, and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal, and proper subjects of punishment, as aiding and abetting crime are in all other cases. The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter. The first amendment to the constitution, in declaring that congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. The oppressive measurers adopted, and the cruelties and punishments inflicted, by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard led to the adoption of the amendment in question. It was never intended or supposed that the amendment could be invoked as a protection against legislation for punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes, as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretense that, as religious beliefs their supporters could be protected in their exercise by the constution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

On this subject the observations of this court through the late Chief Justice Waite, in Reynolds v. U. S., are pertinent. 98 U. S. 145, 165, 166. In that case the defendant was indicted and convicted under section 5352 of the Revised Statutes, which declared that "every person having a husband or wife living who marries another whether married or single, in a territory or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years." The case being brought here, the court, after referring to a law passed in December, 1788, by the State of Virginia, punishing bigamy and polygamy with death, said that from that day there never had been a time in any State of the Union when polygamy had not been an offense against society, cognizable by the civil courts, and punished with more or less severity; and added: "Marriage, while from its very nature a sacred obligation, is, nevertheless, in most civilized nations a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests." And, referring to the statute cited, he said: "It is constitutional and valid, as prescribing a rule of action for all those residing in the territories, and in places over which the United States have exclusive control. This being so, the only question which remains is whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural

marriages shall not be allowed. Can a man excuse his practices to the contrary, because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." And in Murphy v. Ramsey, 114 U. S. 15, 45, 5 Sup. Ct. Rep. 747, referring to the act of congress excluding polygamists and bigamists from voting or holding office, the court, speaking by Mr. Justice Matthews, said: "Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment." It is assumed by counsel of the petitioner that, because no mode of worship can be established, or religious tenets enforced, in this country, therefore any form of worship may be followed, and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. While legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as "religion."

It only remains to refer to the laws which authorized the legislature of the territory of Idaho to prescribe the qualifiations of voters, and the oath they were required to take. The Revised Statutes provide that the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents." Rev. St. 1851. Under this general authority it would seem that the territorial legislature was authorized to prescribe any qualifications for voters, calculated to secure obedience to its laws. But, in addition to the above law, section 1859 of the Revised Statutes provides that "every male citizen above the age of twenty-one, including persons who have legally declared their intention to become citizens in any territory hereafter organized, and who are actual residents of such territory at the time of the organization thereof, shall be entitled to vote at the first election in such territory, and to hold any office therein; subject, nevertheless, to the limitations specified in the next section," namely that at all elections in any territory subsequently organized by congress, as well as at all elections in territories already organized, the qualifications of voters and for holding office shall be such as may be prescribed by the legislative assembly of each territory, subject, nevertheless, to the following restrictions: First, that the right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one, or persons above that age who have declared their intention to become such citizens; second, that the elective franchise or the right of holding office shall not be denied to any citizen on account of race, color or previous condition of servitude; third, that no soldier or sailor, or other person in the army or navy, or attached to troops in the service of the United States, shall be allowed to vote unless he has made permanent domicile in the territory for six months; and, fourth, that no person belonging to the army or navy shall be elected to or hold a civil office, or appointment in the territory. These limitations are the only ones placed upon the authority of territorial legislatures against granting the right of suffrage or of holding office. They have the power, therefore, to prescribe any reasonable qualifications of voters and for holding office, not inconsistent with the above limitations. In our judgment, section 501 of the Revised Statutes of Idaho territory, which provides that "no person under guardianship, *non compos mentis*, or insane, nor any person convicted of treason, felony, or bribery in this territory, or in any other State or territory in the Union, unless restored to civil rights; nor any person who is a bigamist or polygamist, or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage or who is a member of any order, organization, or association which teaches, advises, counsels or encourages its members or devotees, or any other persons, to commit the crime of bigamy or polygamy or any other crime defined by law, either as rite or ceremony of such order, organization, or association, or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this territory."—is not open to any constitutional or legal objection. With the exception of persons under guardianship or of unsound mind, it simply excludes from the privilege of voting, or of holding any office of honor, trust, or profit those who have been convicted of certain offenses, and those who advocate a practical resistance to the laws of the territory, and justify and approve the commission of crimes forbidden

by it. The second subdivision of section 504 of the Revised Statutes of Idaho, requiring every person desiring to have his name registered as a voter to take an oath that he does not belong to an order that advises a disregard of the criminal law of the territory, is not open to any valid legal objection to which our attention has been called.

The position that congress has, by its statute, covered the whole subject of punitive legislation against bigamy and polygamy, leaving nothing for territorial action on the subject, does not impress us as entitled to much weight. The statute of congress of March 22, 1882, amending a previous section of the Revised Statutes in reference to bigamy, declares "that no polygamist, bigamist, or any person cohabiting with more than one women, and no woman cohabiting with any of the persons described as aforesaid in this section, in any territory or other place over which the United States have exclusive jurisdiction, shall be entitled to vote at any election held in any such territory or other place, or be eligible for election or appointment to or be entitled to hold any office or place of public trust, honor or emolument in, under, or for any such territory or place, or under the United States," 22 St. 31. This is a general law applicable to all territories and other places under the exclusive jurisdiction of the United States. It does not purport to restrict the legislation of the territories over kindred offenses, or over the means for their ascertainment and prevention.

The cases in which the legislation of Congress will supersede the legislation of a State or territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There, the action of congress may well be considered as covering the entire ground. But here there is nothing of this kind. The act of congress does not touch upon teaching, advising, and counseling the practice of bigamy and polygamy, that is, upon aiding and abetting in the commission of those crimes, nor upon the mode adopted, by means of the oath required for registration, to prevent persons from being enabled by their votes to defeat the criminal laws of the country. The judgment of the court below is therefore affirmed.

NOTE.—*The Legislative Power of the Territories—Right of Suffrage.*—The political rights of the inhabitants of the territories are their franchises which they hold as privileges in the legislative discretion of congress. Congress may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient.[1] As, in the act March 22, 1882, congress, in the exercise of its power, enacted what is commonly known as the "Edmunds Act," the eighth section of which is alike applicable to all the territories, disfranchising bigamists and polygamists. In 1885, the legislative assembly of Idaho Territory enacted what is known in that territory as the "Test Oath" statute imposing additional disqualifications to those prescribed by congress. The supreme court of that Territory held,[2] and the Supreme Court of the United States, in the principal case have affirmed,[3] the territorial statute to be valid. We think it should have been declared invalid. The acts of congress when applicable to the territories have as full force and effect therein, as if enacted by the territorial legislatures; and it is beyond the power of the latter to annul or in any manner change or modify the same.[4] In other words, the acts of congress applicable to the territories are their paramount law—as binding upon a territorial legislature as the constitution of a State is upon its legislature.[5] It follows, then, that territorial enactments inconsistent with the laws of congress governing the territory are null and void.[6] When congress, therefore, defines the qualifications of electors in the territories in any particular, the qualifications or disqualifications thus imposed are as conclusive upon a territorial legislature, as, if found in a State constitution, they would be upon a State legislature. Judge Cooley says "that when the constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition, or to extend the penalty to other cases."[7] Again, before congress regulated the right of suffrage in the territories, there existed a concurrent power of congress and the territorial legislature upon that subject. This concurrent power is similar in its nature to the concurrent powers of congress and the States upon many subjects, and when congress exercised a power in which it had concurrent jurisdiction, the concurrent power in the inferior legislature over that subject ceased.[8] It is one of the principles of constitutional law laid down by the SupremeCourt of the United States in the days of Story and Taney, but which the present court in the principal case seem to have repudiated, that two legislative wills cannot be exercised at the same time upon the same subject-matter and be compatible with each other. Chancellor Kent in revieving the case of *Huston v. Moore*, *infra*, says: "The doctrine of the court was, that when congress exercised their power upon any given subject, the State could not enter upon the same ground and provide for the same objects. * * * The two distinct wills cannot at the same time be exercised, in relation to the subject, effectually, and at the same time be compatible with each other. If they correspond in every respect, then the latter is idle and inoperative. If they differ, they must, in the nature of things, oppose each other so far as they do differ."[9] The conclusion is apparent that congress having legislated upon the disability growing out of the Mormon relation in disfranchising bigamists and polygamists, this power ceased to be concurrent in

[1] Murphy v. Ramsey, 114 U. S. 15.

[2] Innis v. Bolton, 17 Pac. Rep. 264; Wooley v. Watkins, 22 Pac. Rep. 102.

[3] Davis v. Beason, 10 S. C. Rep. 299. This case is not an appeal from the decisions in the territorial supreme court, but is an affirmance of those judgments in so far as the constitutional question involved is concerned.

[4] Hill v. Territory, 2 Wash. Ter. 147, 7 Pac. Rep. 63; Ducheneau v. House, 10 Pac. Rep. 838.

[5] National Bank v. Yankton, 101 U. S. 129; Ferris v. Higley, 20 Wall. 375; *In re* Attorney-General, 2 N. Mex. 49; Treadway v. Schnauber, 1 Dak. 227.

[6] Ferris v. Higley, 20 Wall. 375; Godbe v. Salt Lake City, 1 Utah, 68.

[7] Cooley's Const. Lim. (5th ed.) 78.

[8] Huston v. Moore, 5 Wheat. 1, 22, 24; Holmes v. Jennison, 14 Peters, 540, 578; Prigg v. Pennsylvania, 16 Pet. 539, 618.

[9] 1 Kent's Com. 389-391.

the territorial legislature, and it, therefore, could not add to or create any other or additional disabilities growing out of the same relation, viz: In extending the disfranchisement to *membership and belief*. Mr. Justice Story says that it would indeed be a strange anomaly, if because congress had not exercised a power to its full extent, the States might do so "by a sort of process of aid."[10] An examination of the Senate Debates[11] shows that congress never intended, and as a matter of fact, purposely and advisedly refused to extend disfranchisement to membership or belief in the doctrines of the Mormon Church. But even without thus resorting to the intention of congress we are justified in our position by another known rule of law, viz: That the will of congress may be discovered as well by what they have not declared, as by the words of the statute, they have expressed; or in the language of the supreme court, "its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it."[12] Another point and we are compelled for want of space to close. The elector by the terms of this odious and inquisitorial enactment is deprived of his franchise before the existence of the proscribed cause of disfranchisement has been first established by due course of law. Whether or not such a fact exists is a judicial proceeding. An expurgatory oath administered by judges of election is not due process of law.[13] The decision in the principal case goes farther towards sustaining the action of a legislative body in the disfranchisement of a constituency than any heretofore rendered, and if this decision is permitted to stand there is not a class of our people but may be subject to any oath that the cunning of a scheming majority may deem expedient to enact.

HENRY Z. JOHNSON.

[10] Huston v. Moore, 5 Wheat. 1, 68.
[11] 17 Cong. Record, part I, p. 407, *et seq.*
[12] Prigg v. Pennsylvania, 16 Pet. 539, 618.
[13] Mechem's Public Offices and Officers, §§ 165, 167; Cooley on Torts (2d ed.) 486; 29 Cent. L. J. 448.

JETSAM AND FLOTSAM.

RESERVATION OF BASE BALL PLAYERS.—The case of The Metropolitan Exhibition Company v. Ward is a single combat between two of the chiefs in the great battle between our base-ball capitalists and our base-ball players. The plaintiff company or its predecessors and the defendant on the 23d of April, 1889, entered into a contract by which the defendant agreed to play ball with the New York Base-Ball Club from 1st April to 31st October, 1889, on a certain salary. The plaintiff company had also by this agreement the right to "reserve" the defendant for the season of 1890 at a salary of not less than three thousand dollars, and in a club not to exceed fourteen members in number at the time of the reserve. The further right was given to the plaintiff company of terminating all obligations on this contract by ten days' notice given at any time. The services thus promised for the year 1889 have been performed by the defendant, and the money for them has been paid. The defendant has been reserved by the plaintiff company for the year 1890, but has been actively employed in the work of other base-ball clubs. The plaintiff company then files this bill to restrain the defendant from playing base-ball or rendering services of any kind for any one until 31st October, 1890, and a motion is made to enjoin the defendant until the hearing of the cause. The main question raised by the suit is, therefore, what is the legal effect of the "reserve" secured to the plaintiff company by the agreement of 23d April, 1889?

Judge O'Brien refuses the preliminary injunction on the ground that a final judgment may be had very soon, and in the mean time the plaintiff can suffer no irreparable injury. Some comments are also made on the merits of the case and on the possibility of the plaintiff's final success.

It seems to us that the plaintiff company has a very good chance of obtaining a permanent injunction on the hearing of the cause. The plain construction of the word "reserve" is this, it is the right to keep, to hold for future use. Let us suppose that there was no stipulation except this reserve, that is, nothing was said about salary and other terms of reserve. Then no one could doubt that the plaintiff would get the relief he asks, for the right to reserve, if translated into terms of the defendant's duty, means that the defendant has bound himself absolutely by a negative covenant to play ball with no one but the plaintiff company. It is to be observed that this is not a positive promise to play with the plaintiff company, but only a negative promise to play with no one else. The plaintiff company has the absolute refusal, so to speak, of the defendant's services. It is the case of a negative unilateral contract for the breach of which damages at law would be clearly inadequate, and which has been already broken or is actually threatened. If the reserve were unconditional, therefore, the merits would be clearly on the side of the plaintiff company.

What new element is introduced by the insertion of the provisos that the defendant shall be reserved, 1, at a salary of not less than three thousand dollars, and 2, in a club of not more than fourteen men at the time of the reserve? In the consideration of this question we may disregard the second proviso altogether, because it was a fact, the existence of which was a condition precedent to the exercise of the power to reserve, and must be presumed now that the reserve has been made. But the contract provides that it shall be considered a condition precedent to the right to reserve that the defendant shall be reserved at a salary of three thousand dollars at least. In other words, by the exercise of the reserve the plaintiff company has become bound to pay the defendant a certain salary if he chooses to play ball with them. If the plaintiff company reserves the defendant, it must also employ him. But, again, it is to be observed that the defendant assumes no obligation to play with the plaintiff company; the defendant is given an offer which is to remain open as long as the reserve holds him from other employment. Thus, when the season opens the defendant is at liberty to retire altogether and enter some other occupation, *e. g.*, the legal profession, for which in this case the defendant happens to be trained; or he may demand employment of the plaintiff company at a salary of three thousand dollars, and he may sue them if he is not employed or paid. But the fact that the defendant has this right against the plaintiff company can in no way diminish his obligation towards the plaintiff company. The promises of the plaintiff company and of the defendant do not, therefore, constitute mutual and dependent conditions, but they are independent and absolute. Hence the defendant is still bound by an absolute negative promise to play ball with no one but the plaintiff company, and this promise is one of the kind that equity usually enforces. We can answer, then, that the provisos make no difference in the legal effect of the reserve.

Nor is it an objection that the plaintiff company may terminate all rights and obligations by ten days' notice. By coming into equity the plaintiff company must be taken to have waived this right forever, because the prayer for relief and the retention of a right of termination are two acts totally inconsistent with one another. This waiver can be made effective by the terms of the decree.

The final judgment of the Supreme Court of New York on this bill will be watched for with interest.—*Harvard Law Review.*

A JURY VALUES A HUMAN LIFE AT $1.—A jury in Judge Anthony's court this week was very justly reprimanded for finding the Chicago, Burlington & Quincy Railroad Company guilty of causing the death of Catherine Hogan, and fixing the amount of the loss to Mrs. Hogan's husband at $1. Mrs. Hogan was killed near the Meagher street crossing Jan. 2, 1882, by a train. The road set up the defense that she was crossing the tracks at a point where there was no road, and the company was not answerable for damages to a trespasser. The jury deliberated over the case some hours, and Tuesday night returned a sealed verdict.

"I will set that verdict aside at once," said the court. "The idea of fixing the value of a human life at $1 is preposterous. It would not pay for the nails in her coffin."

A juror explained that the verdict was not intended to value a human life at $1, but while it was thought that the railroad company was scarcely guilty of negligence under the circumstances it was taken into consideration that John Hogan, who brought the suit, was a poor man and the company was better able than he to pay the costs.

Judge Anthony is not the man to stand any such foolishness in his court on the part of a jury. The verdict was certainly a disgrace to the jury. The jury, when they found the defendant guilty, were bound by their oath to find the true value of the life of the party killed; and for the jury to come in and under the sanction of an oath to say that a human life was only worth one dollar, and expect the court to enter judgment on such a verdict, was an insult to the court, and showed plainly that they did not understand the nature of their official oath or that they did knowingly disregard it.

If the railroad was guilty the value of the life should have been fixed at some reasonable amount; and if not guilty, then the jury should have so found. A railroad company is entitled to the same justice as an individual, and a jury is never justified in making a defendant pay the cost because it is a railroad company.—*Chicago Legal News.*

ORIENTAL JUSTICE.—Four men, partners in business, bought some cotton-bales. That the rats might not destroy the cotton, they purchased a cat. They agreed that each of the four should own a particular leg of the cat; and each adorned with beads and other ornaments the leg thus apportioned to him. The cat by an accident injured one of its legs. The owner of that member wound about it a rag soaked in oil. The cat going too near the fire set the rag on fire, and being in great pain rushed in among the cotton-bales, where she was accustomed to hunt rats. The cotton thereby took fire and was burned up. It was a total loss. The three other partners brought an action to recover the value of the cotton against the fourth partner, who owned the particular leg of the cat. The judge examined the case and decided thus: "The leg that had the oiled rag on it was hurt; the cat could not use that leg; in fact, it held up that leg and ran with the other three legs. The three unhurt legs therefore carried the fire to the cotton, and are alone culpable. The injured leg is not to be blamed. The three partners who owned the three legs with which the cat ran to the cotton will pay the whole value of the bales to the partner who was the proprietor of the injured leg."

RECENT PUBLICATIONS.

A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS. By. Floyd R. Mechem, Chicago, Ill. Callaghan & Co. 1890.

The success of the author's late work on Agency, undoubtedly stimulated him to undertake the preparation of this. The subject is fresh, and to some extent unexplored. We shall be surprised if it does not meet with even a more flattering reception than was accorded the work on Agency. For upon the latter subject so many text-books had been written that only a first-class one would have been successful. A work on the subject of Offices and Officers was certainly in demand. For outside of two or three text-books on topics embraced within the subject little is to be found. The author states that he has endeavored to begin at the beginning, showing what are public offices and who are public officers, and to give in consecutive chapters a view of the whole field, showing who are eligible to public offices, how they may be elected or appointed and qualified, how they may surrender, abandon or forfeit their rights and authorities, what authority they possess, how they should execute it, what liabilities attach to their acts, what rights they possess, and what rights are possessed by the public, and finally by what remedies their duties and liabilities may be enforced. The work is divided into five chapters or books, and each book is subdivided into consecutive chapters. The first three books treat of the subject of what public offices consist, who are public officers, and the eligibility to public office in general. This chapter will be found of special interest as containing many new questions as to the causes of disqualification from office. Chapters four and five treat of appointment and election to office. Chapter six of acceptance and qualifying for office. Book two treats of the termination of the officer's authority either by expiration, abandonment or removal. Book three discusses the authority of officers and the manner of its execution. An interesting chapter is that on the liability of ministerial officers to private action and on contract. The subjects of the extraordinary legal remedies as applied to public office, namely, *mandamus*, injunction, *quo warranto*, and prohibition are thoroughly treated. The book seems to cover all questions within the scope of its subject. The text is concisely and tersely written, and the authorities cited are exhaustive. The book contains about 758 pages, has a satisfactory index and in point of printing and binding is first-class.

BOOKS RECEIVED.

THE FORUM. Edited by Lorettus S. Metcalf, April, 1890: I. The Degradation of our Politics, F. A. P. Barnard. II. Education in Boyhood, President Timothy Douglas. III. Woman's Political Status, Francis Minor. IV. Hypnotism and Crime, Dr. J. M. Charcot. V. Secular Changes in Human Nature, Frances P. Cobbe. VI. No Theology and New Theology, Rev. Dr. Lyman Abbott. VII. Newspapers and The Public, Charles Dudley Warner. VIII. The Rights of Public Property, Rev. Dr. Wm. Barry. IX. Truth and Fraud in Spiritualism, Richard Hodgson.

X. Why the Farmer is not Prosperous, C. Wood Davis. New York: The Forum Publishing Co. 253 Fifth Ave.

A COMMENTARY ON THE LAW OF DIVORCE AND ALIMONY. By Wm. Hardcastle Browne, Esq., of the Philadelphia Bar. Author of a Law Digest on Statutes, Decisions and Cases on Divorce and Alimony. Philadelphia: Kay & Brother, Law Booksellers, Publishers and Importers. 1890.

HUMORS OF THE LAW.

A DOWN-EAST JUSTICE'S COURT—A great deal of fun is continually being poked at Western courts of justice, which are generally depicted as being held in a saloon or in the open air under a tree, while the judge and jury are always illiterate, and invariably conduct the proceedings in defiance of law and justice.

The reality is, of course, quite different, the Western courts, as a rule, being conducted pretty much the same as our own. At any rate, the East has no occasion to throw stones, if we are to believe the Lewiston (Me.) Journal's account of a scene in a country room in that State:

The trial justice, a big pompous official, with a voice like a trombone, took it upon himself to examine a witness, a little, withered old man, whose face was as red and wrinkled as a smoked herring.

"What is your name?" asked the justice.

"Why, Squire" said the astonished witness, "you know my name as well as I know yourn."

"Never you mind what I know or what I don't know," was the caution given, with magisterial severity. "I ask the question in my official capacity, and you'r bound to answer it under oath."

With a contemptuous snort the witness gave his name and the questioning proceed.

"Where do you live?"

"Wal, I snum?" ejaculated the old man. "Why," he continued, appealing to the laughing listeners, "I've lived in this town all my life, an' so's he"—pointing to the justice—"an to hear him go on you would think—"

"Silence!" thundered the irate magistrate. "Answer my question, or I'll fine you for contempt of court."

Alarmed by the threat, the witness named his place of residence, and the examination went on.

"What is your occupation?"

"Huh?"

"What do you do for a living?"

"Oh, git out, Squire! Just as if you don't know that I 'tend gardens in the summer season an' saw wood winters."

"As a private citizen I do know it, but as the court I know nothing about you," explained the justice.

"Wal, Squire," remarked the puzzled witness. "If you know somethin' outside the court room an' don't know nothin' in it you'd better git out and let somebody try this case that's got hoss sense."

The advice may have been well meant, but it cost the witness $10.

THE following anecodote is related of a prominent attorney of western Ohio—now dead. He arose to argue a law question before a somewhat pompous and overbearing judge for whose legal ability not the greatest respect was entertained. "You may sit down" said the judge, "I shall decide the question against you; you are wrong as to the law, "I do not care to hear argument" "May your honor please" said the attorney, "I do not wish to argue the matter for I have no doubt whatever that your honor is correct in his opinion; but I simply wished to read a paragraph to show your honor what a damned fool old Blackstone used to be."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACKNOWLEDGMENT — Plats. — A plat defectively acknowledged, though insufficient to pass the fee of the streets, is yet evidence of a common-law dedication of the right of way.—*Gould v. Howe*, Ill., 23 N. E. Rep. 602.

2. ADMINISTRATION— Advancements. — Where an administrator's final report states that several of the heirs had received money which they had agreed to consider advancements, though there was no charge or acknowledgment thereof in writing, as required by Rev. St. Ill. ch. 39, § 7, such report is conclusive as against those heirs not excepting thereto.— *Long v. Long*, Ill., 23 N. E. Rep. 591.

3. ADMINISTRATOR'S SALE—Taxes.— The title of a purchaser of land at administrator's sale does not relate back to the decedent's death, so as to make the purchaser liable for taxes accruing between such death and the sale.—*LeMoyne v. Harding*, Ill., 23 N. E. Rep. 414.

4. ADMIRALTY — Salvage. — Salvage, as an act, is the relief of property from an impending peril of the sea by the voluntary exertions of those under no legal obligation to assist; and its merit varies with the peril of the property and difficulty of relief.— *Stone v. The Jewell*, U. S. D. C. (Ala.), 41 Fed. Rep. 103.

5. ADMIRALTY—Maritime Liens.—The lien upon a vessel for the safe custody and due transport of goods to be shipped in her attaches at the time of the delivery of such goods to her agents and owners.— *Pearce v. The Thomas Newton*, U. S. D. C. (N. Car.), 41 Fed. Rep. 106.

6. ADMIRALTY—Jurisdiction.— As the territorial limits of a federal court's jurisdiction in civil cases in admiralty are confined to the territorial limits of the judicial district, its civil process does not run to that frontier

or belt of water recognized by the law of nations as under the control of the littoral owner, for purposes of revenue and defense. — *The Hungaria*, U. S. D. C. (S. Car.), 41 Fed. Rep. 109.

7. ADVERSE POSSESSION.—To make an adverse possessory title by the possession of successive occupants, the possession must be connected and continuous; but such connection and continuity may be effected by any conveyance, agreement, or understanding that has for its object a transfer of the possession, and is accompanied by a transfer in fact.— *Vandall v. St. Martin*, Minn., 44 N. W. Rep. 525.

8. APPEAL — Writ of Error. — Any judgment or final order rendered before § 6723, Rev. St., as amended March 28, 1889, took effect (October 1, 1889), may be reviewed on a proceeding in error commenced within two years from the time the judgment or order was rendered. — *Trustees of Canaan v. Board of Infirmary Directors*, Ohio, 23 N. E. Rep. 492.

9. APPEAL—Injunction—Contempt.—Under Code Iowa, § 3499, declaring that no appeal lies from an order to punish for contempt, but that the proceeding may in proper cases be taken to a higher court for revision by *certiorari*, the supreme court has no jurisdiction upon appeal to review the discharge of defendants proceeded against for contempt for the violation of an injunction.—*Currier v. Mueller*, Iowa, 44 N. W. Rep. 555.

10. APPEAL—Affirmance. — Under Rev. St. Ill. 1889, ch. 110, § 83, which provides that, when a judgment appealed from is affirmed, execution may issue, and other proceedings be had, in the lower court, "upon a copy of the order of the supreme or appellate court being filed" in the lower court, no *procedendo* is necessary to reinvest the lower court with jurisdiction, the order referred to being the order of affirmance.—*Smith v. Stevens*, Ill., 23 N. E. Rep. 594.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS. — Under Laws N. Y. 1877, ch. 466, § 2, relating to assignments for the benefit of creditors, and providing that the assent of the assignee, subscribed and acknowledged by him, must appear in writing embraced in or indorsed upon the instrument, actual delivery of the deed of assignment is essential to render it operative to pass title. — *McIlhargy v. Chambers*, N. Y., 23 N. E. Rep. 561.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS — Set off. —In an action by the assignee of an insolvent debtor to foreclose a mortgage, the defendant may offset a debt due him from the insolvent, though at the time of the assignment the mortgage upon which plaintiff sues was not due.—*Richards v. La Tourette*, N. Y., 23 N. E. Rep. 531.

13. ASSIGNMENT FOR BENEFIT OF CREDITORS — Legal Holidays. — Rev. St. Wis. § 2576, as amended by Laws 1879, ch. 194, § 2, subd. 19, and Laws 1885, ch. 142, provides that no court shall be open or transact any business on any legal holiday, unless it be to instruct or discharge a jury, or receive a verdict, and render judgment thereon: *Held*, that an assignment for the benefit of creditors was not avoided by the fact that the assignee's bond was approved by a court commissioner on a legal holiday, though such approval be deemed a judicial act. —*A. G. Spaulding v. Bernhard*, Wis., 44 N. W. Rep. 643

14. ASSIGNMENT FOR BENEFIT OF CREDITORS.— A deed of assignment, complete and regular on its face, purporting to have been made by virtue of the provisions of ch. 148, Gen. Laws 1881 (the insolvency act), although actually unwarranted by the existence of such facts as would alone justify such assignment, cannot be attacked and assailed in collateral proceedings. — *Second Nat. Bank v. Schranck*, Minn., 44 N. W. Rep. 524.

15. ASSIGNMENT FOR BENEFIT OF CREDITORS — Preferences.—A chattel mortgage, free from fraud, given by an insolvent debtor to a creditor in preference to other unsecured creditors, is valid, unless such insolvent, within sixty days, makes an assignment for the benefit of creditors, as provided by Supp. Rev. St. Wis. 1883, § 1693*a*.—*Menzesheimer v. Kennedy*, Wis., 44 N. W. Rep. 508.

16. ATTORNEY AND CLIENT— Evidence. — In an action by an attorney, who had been employed to collect a debt, to recover from the attorneys to whom the claim had been sent the amount retained by them as a fee for assistant counsel employed by them, it is not error to allow plaintiff to be cross-examined as to the extent of the agency conferred on him to collect the debt, and as to his opinion of the value of the services of the assistant counsel.—*Mead v. Glidden*, Mich., 44 N. W. Rep. 596.

17. BAILMENT— Warehousemen. — A deposit of grain for storage is a bailment, the title remaining in the depositor so that he is deemed to be the owner of grain in the warehouse to the amount of his deposit, although the identical grain he deposited has been removed, and other grain, of like kind and quality, substituted in its stead.—*Hall v. Pillsbury*, Minn., 44 N. W. Rep. 673.

18. BANKS AND BANKING — Certificate of Deposit. — A certificate of deposit signed by the cashier of defendant's bank certifying that a certain person had deposited therein a named sum payable to her own order on return of the certificate properly indorsed, is evidence of a deposit within the meaning of Acts Gen. Assem. Iowa, ch. 153, and not of a loan. — *State v. Caldwell*, Iowa, 44 N. W. Rep. 700.

19. BANKS—Forged Drafts.— After a bank-draft which had been paid to one who held it under a forged indorsement was returned to the drawer, the latter redelivered it to the payee, who demanded payment, which was refused, whereupon the drawer paid the draft after protest: *Held*, that the drawer had a right of action against the drawee for its refusal of payment.—*Citizens' Nat. Bank v. Importers, etc. Nat. Bank*, N. Y., 23 N. E. Rep. 540.

20. BANKRUPT LAW—Exemptions.—Property set apart as exempt under the bankrupt law (Rev. St. U. S. § 5045), by the assignee in bankruptcy, is, so long as the bankrupt remains entitled to the exemption under the State law, no more subject to levy and sale than if set apart by the proper ordinary under the State law. — *Dozier v. Wilson*, Ga., 10 S. E. Rep. 743.

21. BILL OF EXCEPTIONS. — Civil Code Proc. Cal. § 625, does not apply to a case where the trial judge has refused to settle a statement or bill of exceptions, but to a case where, in settling a bill, he refuses to allow an exception that ought to be allowed.—*Landers v. Landers*, Cal., 23 Pac. Rep. 126.

22. BOUNDARIES—Adverse Possession.—Where adjoining land-owners claim a strip of land lying upon the outer boundary of their respective tracts, they cannot both have constructive possession of such strip. It attaches to the one having the elder right; and an actual adverse possession must follow to divest it. — *Wait v. Gover*, Ky., 12 S. W. Rep. 1068.

23. CARRIERS — Passengers — Negligence. — A hawser used to warp a vessel around to the dock was made to form an angle by being run through a pulley, which was fastened to the side of the vessel by a piece of wood passed through a loop on the outside. The piece of wood broke, letting the hawser fly back, and strike a passenger standing on the deck. The wood was a stick picked up for the occasion from a pile in the hold: *Held*, that the jury were warranted in finding the defendant, a common carrier, guilty of negligence.—*Miller v. Ocean Steam-Ship Co.*, N. Y., 23 N. E. Rep. 462.

24. CARRIERS—Limiting Liability.—An agreement limiting the liability of a railroad company to a shipper to a certain amount, in case of loss or damage occurring through the negligence of the company, in consideration of a reduced rate of transportation, is valid though the property is worth much more than that amount, and though by Code Va. 1887, § 1296, an agreement to "exempt" the company from liability occasioned by its own neglect is invalid.—*Richmond, etc. R. Co. v. Payne*, Va., 10 S. E. Rep. 749.

25. CHATTEL MORTGAGES — Possession. — A chattel mortgage was executed on a Friday to secure a debt due the next day, but the mortgagor remained in possession until the following Monday and continued to sell goods. There was no evidence that the parties had an understanding that the mortgagor should remain in possession: *Held*, that the mortgagee's delay in taking possession would not be deemed unreasonable, where he offered satisfactory explanation therefor.—*Stevens v. Breen*, Wis., 44 N. W. Rep. 645.

26. CHATTEL MORTGAGES — Recording. — In a suit to foreclose a chattel mortgage a certified copy thereof is admissible in evidence, as against the single objection that it is "a copy," where it appears that the original is filed in another county, and cannot be withdrawn, though Sayles' St. Tex. art. 3190*b*, § 3, regulating the registration of chattel mortgages, provides that a copy of such instrument, certified by the clerk, shall be received in evidence of the fact that it was received and filed according to the clerk's indorsement, "but of no other facts."—*Grounds v. Ingram*, Tex., 12 S. W. Rep. 1118.

27. CONSTABLES — Negligence.— A constable, and the sureties on his official bond, are liable to the owner of property, seized under a proper writ, for damages thereto while in his custody, occasioned by his carelessness or negligence.—*Witkowski v. Hern*, Cal., 23 Pac. Rep. 132.

28. CONSTITUTIONAL LAW—Statutes—Repeal.—Act Ind. March 7, 1889 (an act to create a board of metropolitan police and fire department), having been declared unconstitutional, does not repeal act March 5, 1883 (an act to create a board of metropolitan police), as the legislative intent to repeal a former act on the same subject, without regard to the supposition that the new act would take its place, must be clear in order that the repealing clause of an unconstitutional act may stand. —*State v. Blend*, Ind., 23 N. E. Rep. 511.

29. CONSTITUTIONAL LAW—Amendment.—An amendment to the constitution, submitted by the legislature under the provisions of section 1, art. 16, of that instrument, requires for its adoption a majority of all the votes cast at the election for senators and representatives at which it is submitted to the electors of the State for their approval or rejection.—*State v. Foraker*. Ohio, 23 N. E. Rep. 491.

30. CONSTITUTIONAL LAW—Interstate Commerce.—Section 7193, St. Idaho, prohibiting the exportation of fish from this territory, being in conflict with section 8, art, 1, of the constitution of the United States, providing for the regulation by congress of commerce between the States, is void.—*Territory v. Evans*, Idaho, 23 Pac. Rep. 115.

31. CONTRACT—Usage and Custom.—The practice of a considerable number of merchants engaged in a particular line of business, or ratifying contracts made by their salesmen to pay commissions to third persons for aid in procuring orders is not sufficient evidence of such a long-established and uniform custom to allow such commissions as will warrant the presumption that salesmen generally, in that line of business, have that authority, and justify a contract made with reference to the custom—*Hibbard v. Peek*, Wis., 44 N. W. Rep. 641.

32. CONDITIONAL SALES—Injunction.—A bill by a seller showing that a large portion of the property sold under a contract, retaining title in the seller until the purchase price is fully paid, is, before such payment, being sold by the purchaser, who is pecuniarily irresponsible, and praying for an injunction, receiver, and accounting, with payment of the balance, or sale of the property and application of the proceeds, confers equity jurisdiction on all the grounds for which relief is prayed.—*Field v. Ashley*, Mich., 44 N. W. Rep. 602.

33. CONTRACTS—Against Public Policy.—Where plaintiff's opening statement of his cause of action is that he, as an attorney, for a consideration agreed with defendant, who was accused of crime, to procure the release from jail of a witness against him, in order that the witness might be gotten away, an illegal contract is disclosed, and judgment should be rendered for defendant.—*Grisup v. Grosslight*, Mich., 44 N. W. Rep. 621.

34. CONTRACTS.—Where a person has advanced money for the treatment of an insane married woman whose husband was unable to provide medical care for her, and the person made the advancement on the credit of a bequest which he was informed would be made, and afterwards was made, to her, he can recover the advancement from the bequest.—*In re Renz*, Mich., 44 N. W. Rep. 598.

35. CONTRACTS—Parol Evidence.—A mere written acknowledgment of a sum due is not a complete contract in writing, so as to exclude oral testimony to contradict or explain it.—*Alexander v. Thompson*, Minn., 44 N. W. Rep. 534.

36. CONTRACTS FOR SUPPORT.—Where land is deeded under an agreement that the grantee shall support the grantor for life, and the grantee refuses to comply with his part of the contract, a proper measure of relief is the return of the land to the grantor, where this can be done, and at the election by the grantor it should be ordered.—*Reeder v. Reeder*, Ky., 12 S. W. Rep. 1063.

37. CONTRACTS—Construction—Under a contract between a bridge company and a railroad company, which provides that a draw-bridge with two road-ways shall be constructed,—one road-way to be used exclusively by the bridge company, the other by the railroad company; that each shall keep in repair the road-way used by it. "and that all other portions of said draw-bridge, its piers and abutments, shall be maintained in common by both of the parties hereto, each party paying one-half the expenses thereof," the wheels on which the draw rests and turns must be maintained in common by both companies though the contract imposes on the bridge company the duty of "operating and managing" the draw. — *Portage Lake Bridge Co. v. Wright*, Mich., 44 N. W. Rep. 498.

38. CORPORATIONS—Stockholders.—Where a corporation has issued its capital stock in payment for patents and inventions estimated at more than their true value, in violation of Rev. St. Wis. § 1753, a creditor, who is also a stockholder with full knowledge of the facts, cannot, in the absence of fraud, enforce an individual liability against a stockholder who has paid for his stock in such property at the excessive valuation, on the ground that the stock was not fully paid in.—*Whitehill v. Jacobs*, Wis., 44 N. W. Rep. 630.

39. CORPORATIONS—Service.— Under Pub. Acts Mich. 1887, No. 242, § 3, it is not necessary that service should be in the county in which is the principal office of the corporation, but service on its president in the county in which plaintiff resides is sufficient.— *Potter v. John Hutchinson Manuf'g Co.*, Mich., 44 N. W. Rep. 595.

40. CORPORATIONS—Stockholders.—The facts that the manager of a corporation, at the request of a shareholder to dispose of his shares procures an additional subscription to the capital stock, in an amount nearly equal to the share to be disposed of, and that the balance due against the shareholder for unpaid calls is charged off on the books of the corporation, and credit given him on his personal account for the amount paid in by him, are inoperative to cancel his shares, or to discharge his obligation to pay for them.—*Cartwright v. Dickinson*, Tenn., 12 S. W. Rep. 1030.

41. CORPORATIONS—Judgment Notes.—Where a judgment note is executed in the name and under the seal of a corporation by its secretary, under the direction of its manager and president, who had executed similar notes on behalf of the corporation, the corporation cannot deny the authority of the secretary to execute such note, as against one who received it in good faith. —*McDonald v. Chisholm*, Ill., 23 N. E. Rep. 596.

42. CORPORATIONS—Stockholders.—A stockholder in a railroad company, who at a meeting of stockholders votes for the lease of the road to another company

cannot, while his company continues to be committed to the lease, attack its validity.—*Memphis, etc. Ry. Co. v. Grayson*, Ala., 7 South Rep. 122.

43. CORPORATIONS—Officers.—Under Laws N. Y. 1875, ch. 611, § 21, directors certifying that the capital stock is all paid in full are so liable where the payment is in land at much more than its fair value, and it is not necessary that they should have known its falsity.—*Huntington v. Attrill*, N. Y., 23 N. E. Rep. 544.

44. CORPORATIONS — Stockholders. — The judgment creditor of an insolvent corporation, who first moves in conformity to the provisions of section 32, ch. 23, Gen. St. 1889, to charge a stockholder of the corporation on his liability under the statute, acquires a priority of right to recover against such stockholder, with which a creditor subsequently moving cannot rightly interfere.—*Wells v. Robb*, Kan., 23 Pac. Rep. 148.

45. CORPORATIONS—Stock—A subscriber for shares of the capital stock of a corporation, who has received a transferable certificate showing his payment of all installments due on his shares, as well as his agreement to pay for installments not yet due, is the owner of the shares, subject to the unpaid installments; and, as the certificate gives him complete possession of the shares, the corporation has no seller's lien therein.—*Lankershim Ranch Land & Water Co. v. Herberger*, Cal., 23 Pac. Rep. 134.

46. COSTS—Dismissal.—Under Mill. & V. Code Tenn. § 3940, providing that, where a suit is dismissed for want of jurisdiction, costs shall be adjudged against the party attempting to institute it, costs may be adjudged against a city attempting to enforce a tax-lien by attachment before a magistrate without jurisdiction to issue the attachment.—*Mayor v. Wilson*, Tenn., 12 S. W. Rep. 1083.

47. CRIMINAL LAW—Accessories—Larceny.—On an indictment for larceny, an instruction that defendant was guilty if, after the commission of the act by one W, he aided and abetted said W in the disposition of the stolen property, is erroneous, in that it omits to state that knowledge that the property was stolen is essential to defendant's guilt.—*State v. Empey*, Iowa, 44 N. W. Rep. 707.

48. CRIMINAL LAW—False Pretenses.— Defendant engaged board and lodging without any agreement as to when payment should be made. When a bill was presented to him, he falsely stated that he had money on deposit at a certain place, which he was expecting every day, with which to pay his board. On the strength of this representation, defendant was allowed to remain and continue his board, for which he never paid: *Held*, that he was not guilty of obtaining property within the meaning of the statute.—*State v. Black*, Wis., 44 N. W. Rep. 635.

49. CRIMINAL LAW—Sentence and Punishment.—A sentence takes effect from the day that it is pronounced, and a subsequent sentence, fixing a different term, is a nullity.—*People v. Kelley*, Mich., 44 N. W. Rep. 615.

50. CRIMINAL LAW—Carrying Weapons.—On a prosecution under Pub. Laws Mich. 1887, Act No. 129, enacting that it shall be unlawful for any person, except officers of the peace and night-watches, legitimately employed as such, to carry concealed weapons, it is necessary to allege and prove that defendant does not belong to either of the excepted classes.—*People v. Pendleton*, Mich., 44 N. W. Rep. 615.

51. CRIMINAL LAW—Rape.—Perfect penetration is not necessary to constitute the offense of carnally knowing and abusing a child under the age of fourteen; penetration of the body by the male organ is sufficient.—*People v. Courier*, Mich., 44 N. W. Rep. 571.

52. CRIMINAL LAW— Assault and Battery. —Where a person aims and discharges a pistol at another, and raises a stick within striking distance as if to strike him, and the latter, to prevent injury to himself, seizes the former, and they struggle together, the former is guilty of assault and baitery.—*Englehardt v. State*, Ala., 7 South. Rep. 154.

53. CRIMINAL LAW—Perjury.—Perjury may be predicated on a false answer of a witness that he had never been convicted of a felony, as such answer affects his credibility, and is therefore material to the issue, within Pen. Code Tex. art. 198.—*Williams v. State*, Tex., 12 S. W. Rep. 1103.

54. CRIMINAL LAW—Corpus Delicti.— Defendant confessed that her child was born alive, and that she put it into a certain spring. There was corroborative evidence that it was born alive. There was also evidence that it was not killed by violence; but it was not shown that it was found in the spring, or that it was drowned: *Held*, that the corroborative evidence was not sufficient to prove the *corpus delicti*.—*Harris v. State*, Tex., 12 S. W. Rep. 1102.

55. CRIMINAL LAW—Trespass.—Under Rev. St. Ind. § 2110, making it a misdemeanor to hunt with a dog, or to hunt or shoot with any kind of fire-arms, on inclosed lands, without having first obtained the consent of the owner or occupant thereof, an indictment which charges that defendant committed the offense in a county named upon the lands of a named individual sufficiently describes the land.—*Winlock v. State*, Ind., 23 N. E. Rep. 514.

56. CRIMINAL LAW—Aiding Escape of Prisoner. —An information, which alleges that a prisoner has been committed by a magistrate to the county jail to await an examination; that the committment was placed in the hands of the under-sheriff, who employed a private individual to guard the prisoner; and that while he was so held, and before he had been confined in jail, the defendant unlawfully and feloniously aided the prisoner to escape; and that, by means of such aid, he in fact did escape; but which does not allege the acts done by the defendant, nor that he had knowledge that the prisoner was in legal custody, is insufficient.—*State v. Lawrence*, Kan., 23 Pac. Rep. 157.

57. CRIMINAL LAW—Insanity.—A person indicted for crime cannot, validly, plead, or be tried or convicted or sentenced, while in a state of insanity, although his mental derangement may only have supervened since the date of the crime charged.—*State v. Reed*, La., 7 South. Rep. 132.

58. CRIMINAL PRACTICE—Witness Fees. —Under Code Iowa, § 3814, where a witness in a criminal case attends without being subpœnæd, at the request of defendant's counsel, he is not entitled to mileage, though he may have been included in the order granting defendant authority to subpœna witnesses, that not being an order or request of the court to such witness to attend.—*State v. Willis*, Iowa, 44 N. W. Rep. 699.

59. CRIMINAL PRACTICE—Grand Jury. — In a county containing fifteen townships, from which twelve jurors were to be drawn, the ballots bearing the names to be drawn from each township were sealed in separate envelopes, which were placed in a box, and the clerk drew twelve. The ballots from each of these envelopes were placed in a box, and one drawn therefrom; and the person named on it was placed on the panel: *Held*, that this was such a departure from the mode prescribed by Code Iowa, §§ 240, 241, as to invalidate any indictment found by the grand jury so drawn. —*State v. Beckey*, Iowa, 44 N. W. Rep. 679.

60. CRIMINAL PRACTICE—Larceny.—An indictment for larceny sufficiently describes the kind and value of property stolen as "one lot of silver coin, of the denomination of one doller each, of the currency of the United States, of the value of twenty-five dollars, of the goods, moneys, and chattels of one J. H. M."—*Porter v. State*, Fla., 7 South. Rep. 145.

61. CRIMINAL PRACTICE—Jury.—A defendant in a criminal action may, with the consent of the State and the court, waive a jury of twelve men, and accept the verdict of eleven jurors.—*State v. Grossheim*, Iowa, 44 N. W. Rep. 541.

62. CRIMINAL PRACTICE — Amendment.—An information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant.—*State v. Spencer*, Kan., 23 Pac. Rep. 159.

63. CRIMINAL PRACTICE—Embezzlement.—Under Pen. Code Cal. § 504, it is not necessary for the information, charging an officer of an asssociation with embezzlement, to state the persons composing the association, as the fact of the officer's being a member would not change the offense.—*People v. Mahlman*, Cal., 23 Pac. Rep. 145.

64. CRIMINAL PRACTICE—Plea of Guilty.—Under Pen. Code Cal. § 1018, which provides that "the court may, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and the plea of not guilty substituted," a withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against defendant. — *People v. Ryan*, Cal., 23 Pac. Rep. 121.

65. CRIMINAL PRACTICE — Feloniously. — The word "feloniously" is not equivalent in meaning to "willfully and maliciously." It has no well defined meaning in American law, but is used in this State to describe more particularly offenses which were felonies at common law, or of offenses of gravity which are declared felonies by statute law.—*State v. Watson*, La., 7 South. Rep. 125.

66. DEED— Covenant. — Under a deed which conveys land described as bounded on one side by land of the grantor "intended for a road of two rods in width," and refers to a map showing such road, with a covenant to lay out the road in one year, and keep it open, but which does not convey an easement in the road, the grantee obtains title in fee up the center of the road, where it appears that such road is necessary for access to the land conveyed. — *In re Ladue*, N. Y., 23 N. E. Rep. 465.

67. DEEDS—Description. — A deed to a railroad company of a right of way "along the line as surveyed and laid out" by the company's engineer is not void for uncertainty, where it appears that when the deed was executed the line of the road had been surveyed and distinctly marked by stakes stuck in the ground, and that subsequently the road was constructed following the exact line of the survey.— *Thompson v. Southern, etc. R. Co.*, Cal., 23 Pac. Rep. 130.

68. DEED— Boundaries. — A deed described the land conveyed as "commencing on the S road at the northeast corner of the land owned by S; running south, to the southeast corner of said S's land, two acres; from thence, easterly and parallel with said S road, two acres; thence running northerly two acres, until it strikes said road, and thence westerly along said road two acres to the beginning; containing four acres of land, neither more nor less: *Held*, that as the description by quantity so clearly shows the intention to limit the grant to four acres in rectangular form, and as the length of the west line is given, the intention must control distances. — *Rioux v. Cormier*, Wis., 44 N. W. Rep. 654.

69. DEPOSITIONS—Refusal to Testify.— Sayles' Civil St. Tex. art. 2243, which provides that, upon the refusal of a party whose deposition is taken to answer the interrogatories propounded, they shall be taken as confessed, upon the certificate of the officer taking the deposition, is intended to apply only to the case of a deliberate refusal to answer, and if it be shown that the party declined under a mistake as to his rights, and not contumaciously, the interrogatories should not be taken as confessed, provided that at the trial he shows that he is willing to answer them.—*Bounds v. Little*, Tex., 12 S. W. Rep. 1109.

70. DESCENT AND DISTRIBUTION— Non-resident Aliens. —Under Code Iowa, § 2442, providing that the "widow of a non-resident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from decedent," the term "non-resident alien" means one who resides outside the State.—*In re Gill's Estate*, Iowa, 44 N. W. Rep. 553.

71. DESCENT AND DISTRIBUTION.—An heir has the right to be discharged from the payment of his ancestor's debts, out of his own property, by abandoning the effects of his ancestor's succession to his creditors; the right of preserving the identity of his own property from that of his ancestor's succession; and the right of claiming out of the ancestor's succession the debts that are due to him therefrom; but to do so he must safeguard his acceptance of the succession by a clear and distinct reservation of the benefit of inventory. — *Succession of Murray*, La., 7 South. Rep. 126.

72. DIVORCE—Defenses.—A decree *a mensa et thoro*, entered under the provisions of § 30 *et seq.* ch. 62, Gen. St. 1878, and remaining in force, does not bar an action for a divorce *a vinculo matrimonii*, upon any of the grounds specified by statute. — *Evans v. Evans*, Minn., 44 N. W. Rep. 524.

73. DOWER—Divorce.— Under Rev. St. Ill. ch. 41, § 14, which provides that divorce shall not bar the innocent party's right to dower, and § 15, which provides that voluntary desertion and adultery will bar dower, a wife who has been divorced from her husband on the ground of his desertion is not barred of her dower though she afterwards commit adultery. — *Gordon v. Dickison*, Ill., 23 N. E. Rep. 439.

74. DRAINAGE—Railroad Company.— In the passage of act April 8, 1881, as amended by act March 8, 1883, it was not the legislative intent to provide a system of drainage for the fresh-water lakes of the State, but only for wet and marshy lands, swamps, ponds, and the like.—*Baltimore, etc. R. Co. v. Ketring*, Ind , 23 N. E. Rep. 527.

75. EASEMENT—Ways— Obstruction — One who has purchased and acquired by grant a right of way across the lands of another for the purpose of a carriage road from the public highway to the grantee's residence, may maintain injunction to restrain the grantor from making such use of the land thus granted as will render the road impassable, or otherwise interfere with its use by the grantee for the purpose of a carriage road.—*Herman v. Roberts* N. Y., 23 N. E. Rep. 442.

76. EJECTMENT—Judgment.—A judgment in ejectment against a tenant, where the landlord is not notified of the pendency of the suit, and does not appear, does not affect a subsequent grantee of the landlord.— *Powers v. Schoeltens*, Mich., 44 N. W. Rep. 613.

77. ELECTIONS—Contests.—Under Rev. St. Ill. ch. 46, § 114, which provides that in election contests process shall be served as in chancery cases, and ch. 22, § 11, which provides that service of summons in chancery shall be made by delivering a copy to the defendant, or leaving such copy at his place of abode, a return to a summons in an election contest, that it was served by reading it to the contestee, is insufficient to confer jurisdiction of the person. — *Greenwood v. Murphy*, Ill., 23 N. E. Rep. 421.

78. ELECTIONS—Challenges.—Under Gen. Election Law N. Y. tit. 4, art. 2, § 7, the inspectors being ministerial officers, have no discretionary power to reject the vote of an elector who has answered the statutory questions, and taken the prescribed oaths, even though he has failed to satisfy them as to his qualifications.— *People v. Bell*, N. Y., 23 N. E. Rep. 533.

79. EMINENT DOMAIN.— As the Texas statutes require a railroad company to first pay the compensation before appropriating land, one upon whose land a railroad company has entered without condemnation does not lose his lien or title by recovering judgment in a suit for damages, and may recover compensation from the purchaser of the rights of the first.—*Rio Grande, etc. Ry. Co. v. Ortiz*, Tex., 12 S. W. Rep. 1129.

80. EMINENT DOMAIN — Jurisdiction. — Where the charter of a railroad company gives it the right to condemn land "for the construction and maintenance" of

its road, condemnation proceedings instituted by the company for land, to be used for the purposes of its road and for the alteration of a public street, are void, even on collateral attack, for want of jurisdiction of the subject-matter. — *Chicago, etc. Ry. Co. v. Galt*, Ill., 23 N. E. Rep. 425.

81. EQUITY—A Mistake of Law.—One who was aunt of the half-blood, and cousin of the whole blood, to a decedent, having, in accordance with the legal opinion misinterpreting a Delaware statute, accepted as her portion of the intestate's real estate such portion only as she was entitled to as cousin, with the heirs of the half-blood excluded, while she was also entitled, by law, to a portion as aunt of the half-blood, and having, under erroneous advice, conveyed away her inheritance, has made a mistake of law, and not a mistake of mixed law and fact, and will not be relieved, in a court of equity, by a decree for a reconveyance. — *Hamblin v. Bishop*, U. S. C. C. (Del.), 41 Fed. Rep. 74.

82. ESTOPPEL—In Pais.—An estoppel *in pais* does not arise from the mere representations or conduct of a person, nor until the same shall have been acted upon by another.—*Stuart v. Lowry*, Minn., 44 N. W. Rep. 532.

83. EVIDENCE—Res Gestæ. — In an action for injuries received from being pushed against a buzz saw, where plaintiff has testified that he, as a workman in a planing-mill, was oiling the saw under instructions from the foreman, and the foreman has testified that plaintiff was under his orders, and had no right to do anything in relation to the saw without his instructions, defendant can show the foreman's instructions to plaintiff, both as material evidence and as part of the *res gestæ* — *Ribble v. Starat*, Mich., 44 N. W. Rep. 594.

84. EVIDENCE—Supplementary Proceedings.—In a supplementary proceeding, it is not necessary to show what is expected to be proved by a question in order to raise the question of its admissibility, as the very nature of the proceeding is to obtain information from the adverse party, the character of which is unknown to the party making the examination.—*Comstock v. Grindle*, Ind., 23 N. E. Rep. 494.

85. EVIDENCE—Negligence. — Where one of the issues to be tried is whether the person injured was in the exercise of ordinary care, and there were eye-witnesses as to his conduct at the time of the injury, the opinions of experts as to whether he was generally a careful and skillful man is not competent evidence. —*Southern Kan. Ry. Co. v. Robbins*, Kan., 23 Pac. Rep. 113.

86. EXECUTION. — Where personal property has been levied on by a duly-authorized officer, the levy is not invalidated, as between the parties, by delivering it to the wife of defendant to keep until the day of sale, and defendant is bound to restore the property at that day, if in his possession. — *McCullough v. McClintock*, Ala., 7 South. Rep. 149.

87. EXECUTION—Sale.—A sale on execution, under a judgment against a firm, of the homestead of one of its members, which had been conveyed before the judgment creditors had done anything to fix a lien on the land, and of which conveyance they had notice when they levied their execution, will not be enjoined, as the possession of the grantee will not be disturbed by the sale, and he has an ample remedy in trespass to try title. —*Mann v. Wallis*, Tex., 12 S. W. Rep. 1123.

88. EXECUTION — Redemption. — Where a judgment debtor, whose land has been sold under an execution, confesses judgment in favor of another creditor, under an agreement that he shall redeem from the execution, buy in the land, and hold the same as security for his debt, the debtor, after paying such creditor in full, is entitled to a reconveyance of the land. — *Pearson v. Pearson*, Ill., 23 N. E. Rep. 418.

89. FALSE REPRESENTATIONS.—*Held*, plaintiff not entitled to recover for false representations made in sale of land where the means of information were equally open to both parties.—*Cobb v. Wright*, Minn., 44 N. W. Rep. 662.

90. FALSE REPRESENTATIONS.—Defendants are liable for false representations inducing the plaintiffs to enter into the contract, though the contract concludes with a condition that "the above is an exchange of said property, without regard to the valuation of said property, or either of them."—*Phelps v. James*, Iowa, 44 N. W. Rep. 543.

91. FEDERAL COURTS—Jurisdiction — Aliens. — Under Act Cong. Aug. 13, 1888, the circuit court has no jurisdiction of an action by citizens of the district against an alien temporarily in the district.—*Myer v. Herrera*, U. S. C. C. (Tex.), 41 Fed. Rep. 65.

92. FEDERAL COURTS—Jurisdiction.—Rev. St. U. S. § 737, does not require a court to entertain jurisdiction of a bill for an account against three partners, two of whom are non-residents, were not served, and do not appear. They are parties of such importance that complete justice cannot be done without their presence. —*Dutchesse d'Auzy v. Porter*, U. S. C. C. (Conn.), 41 Fed. Rep. 68.

93. FEDERAL COURTS—Eminent Domain.— Under Act Cong. 1875, giving circuit courts jurisdiction in all cases "arising under the constitution or laws of the United States," such courts have jurisdiction of a bill for an injunction to restrain a railroad company from extending its road across land belonging to the United States, and to which the complainant claims to have an equitable title as a pre-emptor, where the question in dispute is whether complainant has a right to the land under the land laws of the United States.— *Jones v. Florida, etc. Co.*, U. S. C. C. (Fla.), 41 Fed. Rep. 70.

94. FRANCHISE—License. — Though the grant of authority by a common council to operate a street railway on payment of certain license fees was invalid for lack of authority in the council, yet the grant and contract with the company having been ratified by Laws N. Y. 1854, ch. 140, under which act, in part, the company was incorporated, the agreement to pay the license also became valid.—*Mayor v. Eighth Ave. Ry. Co.*, N. Y., 23 N. E. Rep. 550.

95. GUARDIAN AND WARD — Mental Incompetency. — Under How. St. Mich. § 6314, a petition stating that the husband of the petitioner is unable to provide a suitable maintenance for his family, that he is not of sufficient ability to manage his personal affairs, and that he is in the habit of making foolish bargains, and squanders what he may earn, does not show a case giving the court jurisdiction to appoint a guardian.—*Partello v. Holton*, Mich., 44 N. W. Rep. 619.

96. HABEAS CORPUS—Practice.—Code Crim. Proc. Tex. art. 137, providing that after indictment found a writ of *habeas corpus* must be made returnable in the county where the offense has been committed, does not prevent a writ issued from one district court of a county which is divided into two districts from being returned to the judge of the other district, when the judge of the former has requested the latter to hear the case for him, and has absented himself from the district.— *In re Angus*, Tex., 12 S. W. Rep. 1099.

97. HABEAS CORPUS—Bail Bond.—After issuance of a writ of *habeas corpus* in behalf of one held under final process, the judge issuing the writ has jurisdiction to admit the prisoner to bail, even before the writ is returned.—*Matson v. Swanson*, Ill., 23 N. E. Rep. 595.

98. HIGHWAYS—Dedication.—Where one causes a survey to be made, and fences off a road along the same, intending to leave only to the public the highway which he believes has been already established by the county court, but with no intention to dedicate the same, the dedication is nevertheless binding where expense has been incurred by third persons, by locating dwellings, etc., on the faith of such dedication.—*State v. Waterman*, Iowa, 44 N. W. Rep. 677.

99. HIGHWAYS—Establishment.—A cow-stable, wagon-shed, and chicken-house are "buildings or fixtures," within the meaning of Rev. St. Wis. 1878, § 1263, which provides that no public highway shall be laid out

through or upon any "building or fixture, or through or upon the yard or inclosure necessary to the use or enjoyment thereof, without the consent of the owner." —*Smart v. Hart*, Wis., 44 N. W. Rep. 514.

100. HOMESTEAD.—A husband and wife living together constitute a "family," within the meaning of the word as used in the first section of the ninth or homestead article of the constitution of 1868.—*Miller v. Finegan*, Fla., 7 South. Rep. 140.

101. HOMESTEAD— Conveyances.— Since the conveyance of a homestead by a husband, in which his wife does not join, is declared by Code Iowa, § 1990, to be void, such conveyance, when made to a daughter, may be attacked by any one having an interest in the property, though all the beneficiaries of the homestead have apparently acquiesced in the conveyance since it was made.—*Bolton v. Oberne*, Iowa, 44 N. W. Rep. 547.

102. HUSBAND AND WIFE.—Where a husband receives the respective estates of his wife's ancestors and relatives, and appropriates the same to his own use, the mere fact that she consented that he might collect and receive the money raises no presumption that she intended to bestow it upon him. In such a case he becomes her agent or trustee, and must account.—*Denny v. Denny*, Ind., 23 N. E. Rep. 519.

103. HUSBAND AND WIFE—Parties.—Where a complaint alleges a joint cause of action by a husband and wife, and the evidence shows that the former had no interest in the cause of action, judgment may properly be rendered in favor of the latter under Rev. St. Ind. § 568, providing that judgment may be given for or against one of several plaintiffs, and that the court may determine the ultimate rights of the parties as between themselves.— *Nicodemus v. Simons*, Ind., 23 N. E. Rep. 521.

104. HUSBAND AND WIFE — Community Property. — A husband and wife occupied a tract of land belonging to the United States from 1847 until 1856, when the wife died. The husband continued to occupy the land until 1871, when he received a deed to it from the town of Santa Cruz under Act Cong. July 23, 1866: *Held*, that the occupation by the husband and wife during her life did not operate to render the land community property, or vest the wife with any ownership whatever. — *Labish v. Hardy*, Cal., 23 Pac. Rep. 123.

105. INJUNCTION—Mandamus. — When the granting of an injunction is an abuse of judicial discretion that can not be justified on legal principles, and the case is urgent, a *mandamus* will be awarded to dissolve the injunction, though the order which granted it is reviewable on appeal.—*City of Detroit v. Hosmer*, Mich., 44 N. W. Rep. 622.

106. INSOLVENCY—Fraudulent Conveyance.—An application by creditors of an insolvent debtor, under the statute, for leave to share in the estate without filing releases, should be denied, unless there has been a fraudulent concealment, disposal, or incumbering of property with intent to defraud creditors. An honest inability, on the part of the debtor, to account for the manner in which his property has been expended, does not justify granting such an application. — *Welch v. Bradley*, Minn., 44 N. W. Rep. 667.

107. INSOLVENCY—Prohibition.—An action was brought against the petitioner in the justice's court on a promissory note, and an attachment levied on his property, and he filed his petition in insolvency, and the property attached was released, and he filed his answer in the justice's court, setting up the insolvency proceedings; but plaintiff obtained, from the superior court, in which the insolvency proceedings were pending, an order permitting the justice's court to proceed to judgment: *Held*, under Code Civil Proc. Cal. 686, that a writ of prohibition would be granted.—*Hayne v. Justice's Court*, Cal., 23 Pac. Rep. 125.

108. INSURANCE—Evidence. — In an action on a policy of insurance, where the agent of the insurance company testifies that his authority is in writing, and at that time in his possession, questions as to whether he has authority to cancel policies issued by his company are properly excluded, as the writing is the best evidence of his authority, and should be produced.—*Lee v. Agricultural Ins. Co.*, Iowa, 44 N. W. Rep. 683.

109. INSURANCE—By-laws.—A by-law of a town mutual insurance company, providing that "policies of insurance may be assigned with the consent of the president and secretary, the parties paying fifty cents recording fees, at the same time giving his undertaking to the company, and the company will not hold itself responsible for loss on property so transferred until such assignment so made and undertaking given," does not apply to a case where property covered by its policy is transferred, and the policy-holder retains an insurable interest therein.—*Jeride v. Cottage Grove, etc. Co.*, Wis., 44 N. W. Rep. 636.

110. INSURANCE—Homestead.—Under Const. Tex. art. 16, §§ 50, 51, providing that no mortgage or other lien on the homestead shall be valid except for the purchase money or improvements thereon, a lien on a homestead is only voidable at the instance of a person interested in the homestead, and the holder of such voidable lien has an insurable interest in the property. — *Parks v. Hartford, etc. Co.*, Mo., 12 S. W. Rep. 1058.

111. INSURANCE— Policy. — Where an insurance company's agent makes out the application, stating that the applicant is the owner of the fee of the premises, and that no other person is interested in the property, after he has been informed of the interest of another person, and that the policy is intended to be taken for the full insurable value of both interests, the company can neither avoid the policy, nor limit recovery thereunder, to the insurable interest of the applicant. — *Crouse v. Hartford, etc. Co.*, Mich., 44 N. W. Rep. 497.

112. INSURANCE—Conditions— Warranty. — Where the agent of an insurance company, who takes an application, and writes out the answers contained therein, has full knowledge of the facts, and relies upon his own knowledge, well knowing that the applicant has no accurate knowledge in regard to the facts inquired about, and the applicant, an illiterate man, signs said application, relying upon the good faith of the agent, the company cannot avoid payment because of misrepresentations as to value, location, and incumbrances, as the statements will be construed, not as warranties, but representations.— *Phœnix Ins. Co. v. Golden*, Ind., 23 N. E. Rep. 503.

113. INSURANCE—Conditions— Warranty. — Where a policy of insurance recites that it is based on the "representations" contained in the application of the insured, and also recites that such statements are made warranties, a statement as to the age of the building insured will be construed to be a representation, and not a warranty; the rule being against the construction of ambiguous language so as to impose the obligation of a warranty on the insured. — *Rogers v. Phœnix Ins. Co.*, Ind., 23 N. E. Rep. 498.

114. INSURANCE—Conditions.—A building, insured as a morocco factory, which is vacated by the tenants, and its key given to the owner's renting agent, who visits it occasionally, is unoccupied, within the meaning of a clause in the policy making it void if the building become vacant or unoccupied.— *Halpin v. Phenix Ins. Co.*, N. Y., 23 N. E. Rep. 482.

115. INTERVENTION — Chattel Mortgage. — A person holding a mortgage upon personal property, his debt being due, unpaid, and exceeding in amount the value of mortgaged property alleged to have been destroyed by the negligence of a third person, has an interest of such direct and immediate character, in the result of an action brought by the mortgagor against such third person to recover the value of said property, as will entitle him to intervene and participate in the litigation. — *Wohlwend v. J. I. Case, etc. Co.*, Minn., 44 N. W. Rep. 517.

116. JUDGE—Disqualification.—Under Code Civil Proc. Cal. § 170, where three parties are adversely claiming to be the owners of a certain tract of land, one of whom is the judge, and the other two adverse litigants before him, asking him to determine which of them is the owner of the land which he claims to own, and to appoint a receiver for said land, a writ of prohibition will issue to prevent him from acting further in said cause.—*Heilbron v. Campbell*, Cal., 23 Pac. Rep. 122.

117. JUDGMENT—Default.—A final judgment by default cannot be set aside by an ordinary motion for a new trial.—*Ervin School Tp. v. Tapp*, Ind., 23 N. E. Rep. 505.

118. JUDGMENT—Assignment. — A judgment creditor, who has assigned the judgment as security for a debt, but has retained the right to issue execution thereon, and to take any other necessary and proper steps for its collection, may issue execution in his own name, his assignee assenting thereto.—*Collins v. Smith*, Wis., 44 N. W. Rep. 510.

119. JUDGMENT.—An action may be maintained to set aside a judgment upon the ground that no process had been served, or jurisdiction acquired in any manner. In such an action, it is not incumbent on the plaintiff to show, in addition to the want of jurisdiction, that upon the merits of the matter the claim involved in the judgment was unjust.—*Magin v. Pitts*, Minn., 44 N. W. Rep. 675.

120. JUSTICE OF THE PEACE—Jury Trial.— The denial of a jury by a justice of the peace on a trial for misdemeanor does not affect his jurisdiction; and the error, if any,—for which there is a plain, speedy, and adequate remedy by appeal to the superior court,—cannot be arrested or corrected by the writ of prohibition.—*Powelson v. Lockwood*, Cal., 23 Pac. Rep. 143.

121. LAND CERTIFICATES—Ownership.—The facts that a person causes a certificate to be located on land, and a survey to be made in the name of the original grantee, and that this is returned to the general land-office, are not sufficient proof that the original grantee sold the land certificate to such person.—*Hernson v. Davenport*, Tex., 12 S. W. Rep. 1111.

122. LANDLORD AND TENANT—Tax-Title.—Under 1 Rev. St. N. Y. p. 744, § 3, providing that an attornment by a tenant to a stranger is void unless made with the consent of the landlord, or pursuant to a judgment at law or decree in equity, or to a mortgagee after forfeiture, an attornment by a tenant to one claiming under a tax-deed is void as against the rights of his landlord.—*O'Donnell v. McIntyre*, N. Y., 23 N. E. Rep. 455.

123. LANDLORD AND TENANT—Leases.—In a lease of the first loft of a building, the clause, "Tenant to have privilege of storing a reasonable number of cases in the basement," does not amount to a lease of any part of the basement.—*Cluett v. Sheppard*, Ill., 23 N. E. Rep. 589.

124. LIBEL—Where the name of a person alleged to have been libeled is given in the published article as "John F——," which was plaintiff's name, but it appears that he was generally known as "Jonn D. F——," and had adopted the middle letter expressly to distinguish him from persons known as "John F——," and in an action for the publication of the libel, there is no evidence that he was the person referred to in the article, defendant is entitled to a verdict.—*Finnegan v. Detroit Free Press Co.*, Mich., 44. N. W. Re, 585.

125. LIENS—Priority.—Where one loans another money to take up notes given for a balance of purchase money of land, and the deed is made to the lender, who gives a bond for title to the borrower and the land is sold under execution against the borrower, the lender is entitled to be paid out of the proceeds of the sale, in preference to creditors.—*Hill v. Cole*, Ga., 10 S. E. Rep. 739.

126. LIMITATION OF ACTIONS — Executors. — Under Code Ga. § 2922, an action by the heirs of a legatee, to recover a legacy, brought more than ten years after the collection of all the assets, though within five years affer they attained their majority, is barred; section 2607, giving an heir, distributee, or legatee, who is a minor at the time of the discharge of the executor, five years after attaining his majority in which to sue not applying to the heirs of a legatee.—*Hines v. Weaver*, Ga., 10 S. E. Rep. 741.

127. LIMITATIONS — Sale of Bonds.— Where the purchasers of bonds, pending a suit to establish a lien upon them, sell the same again, the statute of limitations does not begin to run against the lien claimant's right to compel such purchasers to account for his interest in the bonds until the final determination of the suit establishing his lien.—*Hovey v. Elliott*, N. Y., 23 N. E. Rep. 475.

128. LIMITATIONS OF ACTIONS — Contract. — A letter written by defendant's agent to plaintiff, and received by him which states that defendant has sold plaintiff a quantity of pork, giving amount, date of delivery, and price,—the latter to be by 60-day draft, "or banker's reimbursement," with discount of one-half per cent.—is a written contract within the meaning of the statute of limitations (Rev. St. Ill. ch. 83, § 16), on which suit may be brought within 10 years.—*Memory v. Niepert*, Ill., 23 N. E. Rep. 431.

129. LIMITATION OF ACTIONS—Fraud.—Under Rev. St. Ind. § 2442, the bar of the statute of limitations cannot avail a partner who misleads his copartner by representing that a claim cannot be collected, when he has in fact collected it, and appropriated the avails to his own use; and it is immaterial that the partnership had dissolved before he received the money.—*Fisher v. Tuller*, Ind., 23 N. E. Rep. 523.

130. MARRIAGE— Consent of Parents. — Under Code Ala., 1886, §§ 2315, 2318, if the father was living his consent was necessary, and the consent of the mother was not sufficient, though the father was temporarily absent from the State.—*Riley v. Bell*, Ala., 7 South Rep. 155.

131. MARRIED WOMEN — Family.—A married woman who for business purposes at least, is the actual and potential head of the family for clothing bought by herself for her minor son, she being the only person to whom credit was given.—*Fafeyta v. McGoldrick*, Mich., 44 N. W. Rep. 617.

132. MARRIED WOMEN.—A married women is not liable on her note given for money loaned to her husband to pay the premium on a life insurance policy payable to her, if living at his death, otherwise to his representatives for the benefit of chidren.—*Jones v. Bradwell*, Ga., 10 S. E. Rep. 745.

133. MASTER AND SERVANT— Contract.— A contract to work as a farm hand for a year at a certain price is terminated by the death of the master during the term, and the servant can only recover for the period of service during the master's life, though he continues to work until the end of the year under the direction of the master's widow, to whom a life-estate in the farm and the full use and control of the personalty were devised.—*Lacy v. Getman*, N. Y., 23 N. E. Rep. 452.

134. MASTER AND SERVANT—Fellow-servants.—The engineer of locomotive and independent contractor to load engine with coal were not fellow-servants, under the rule exempting the railroad company from damages resulting from the negligent act of fellow-servants.—*Union Pac. Ry. Co. v. Billeter*, Neb., 44 N. W. Rep. 483.

135. MASTER AND SERVANT—Fellow-servants.—Where the train dispatcher of a railroad company has absolute control over the running of its trains, and is charged with the duty of directing their movements, he is not a fellow-servant of the employees in charge of trains, who are bound to obey his directions.—*Hunn v. Michigan, etc. R. Co.*, Mich., 44 N. W. Rep. 502.

136. MASTER AND SERVANT—Fellow-servants.—A bridge watchman on a railroad and the engineer and conductor of a train on the road being engaged in different departments of the company's service, and working under the immediate direction of different formen, are not fellow-servants, so as to exempt the company from

liability to the former for the trainmen's negligence. —*Pike v. Chicago, etc., R. Co.*, Mo., U. S. C. C. Rep. 41 Fed. 95.

137. MASTER AND SERVANT—Contract.—In an action to recover wages, where the plea is the general issue, and there is no notice of set-off, and no evidence that the contract of hiring was that the board of plaintiff was to be deducted from his wages, he cannot be asked, on cross-examination, questions tending to show that defendants had paid his board for him.—*O'Hare v. Mernan*, Mich., 44 N. W. Rep. 599.

138. MECHANICS' LIENS—Lubricating oil sold to be and actually used on mill machinery is not "material," within the purview of Sanb. & B. Ann. St. Wis. § 3314, as amended, which provides, *inter alia*, that every person who, as principal contractor, architect. etc., furnishes any materials in or about the erection, construction, protection, or removal of any machinery, erected or constructed so as to be or become a part of the freehold shall have a lien for such materials.—*Standard Oil Co. v. Lane*, Wis., 44 N. W. Rep. 644.

139. MECHANICS' LIENS—Pleading.—A complaint in an action to enforce a mechanic's lien, in which the special contract between contractor and owner is stated, can be changed by amendment into an action on the contract, in which the contract may be counted on specially, or the common counts in *indebitatus assumpsit* may be used and the special contact is admissible in evidence under the common counts.—*Castagnino v. Balletta*, Cal., 23 Pac. Rep. 127.

140. MECHANICS' LIEN— Notice. — Under Code Civil Proc. Cal. § 1187, which provides that the notice of mechanic's lien filed shall contain "a statement of his demand, with a statement of the terms, time given, and conditions of his contract," the notice need not state the value of the labor or materials furnished, nor give an itemized account of the labor and materials for which liens are claimed, nor state facts showing a performance of the contract.—*Jewell v. McKay*, Cal., 23 Pac. Rep. 139.

141. MORTGAGES— Foreclosure.—A mortgage on two separate lots, to secure several notes, recited that one lot was pledged to secure the payment of that note only which would first fall due, while the other was to secure all the notes. The mortgagor afterwards sold the former lot: *Held*, that on foreclosure, the lot retained by the mortgagor should be sold first, and the proceeds applied on the note first due. If the note should be thus satisfied, the other lot, which was limited as security for this note only, would be released from the lien.—*Mickley v. Tomlinson*, Iowa, 44 N. W. Rep. 684.

142, MORTGAGES — Coupon Interest. — The holder of overdue coupon interest notes, secured by mortgage, may maintain an action to foreclose the mortgage. although the principal debt is not yet mature, and is held by another person, who is made a party to the suit.—*Cleveland v. Booth*, Minn., 44 N. W. Rep. 670.

143. MORTGAGES— Foreclosure. — Where a mortgage securing notes due at different times provides that, upon default in the payment of either of the notes, all shall become due and the mortgage may be foreclosed, the proceeds on the foreclosure are not to be applied *pro rata* to all the notes, but in the order of their maturity.—*Leavitt v. Reynolds*, Iowa, 44 N. W. Rep. 567.

144. MORTGAGE—Waste.—Waste upon real estate, by a mortgagor in possession will not be enjoined unless the acts complained of may so impair the value of the property as to render it insufficient, or of doubtful sufficiency, as security for the debt. But the value of the property should remain largely in excess of the debt secured by it.—*Moriarty v. Ashworth*, Minn., 44 N. W. Reg. 531.

145. MORTGAGES — Assumption of Debt. — B, who had bought land, and given his notes, and a mortgage to secure them, for the purchase money, sold the land to defendant, who indorsed and assumed payment of the notes. Defendant conveyed the land, and secured a discharge in bankruptcy, leaving one of the notes unpaid: *Held*, that defendant, in assuming the notes, became the principal debtor therefor, so that they were an existing indebtedness, from which the proceedings in bankruptcy discharged him. — *Begein v. Brehm*, Ind., 23 N. E. Rep. 496.

146. MORTGAGE—Foreclosure—Dower. — Where, in a foreclosure suit, the mortgagor, who has conveyed the land by unrecorded deed of which the mortgagee has no notice, is made a party defendant, but not served, and his grantee, a married man, is also made a party defendant and contests the suit, the latter's wife, who is not made a party, is not barred by the foreclosure of her inchoate right of dower. — *Kurscheedt v. Union Dime Sav. Inst.* N. Y., 23 N. E. Rep. 473.

147. MORTGAGE—Partnership.—A mortgage upon partnership property, to secure a partnership debt, purported to be executed by "A. T. J. & Son Co., per F J, a member of the firm," and thereafter in the instrument the grantor was mentioned as "the said A. T. J & Co.," and "A. T. J. & Co., the said mortgagor." The mortgage was signed by said F J and another partner, and it appeared that the third partner assented to the same: *Held*, that the mortgage was valid, as against creditors of the partnership whose liens attached afterwards. — *Citizens' Nat. Bank v. Johnson*, Iowa, 44 N. W. Rep. 551.

148. MUNICIPAL BONDS.—Where bonds recite that they were issued for the purpose of funding the existing debt of the city, and the city is authorized to issue such bonds, it is estopped, as against a *bona fide* holder, to set up that the antecedent indebtedness was fraudulent. *Nat. Bank v. Town of Grenada*, U. S. C. C. (Cal.), 41 Fed. Rep. 87.

149. MUNICIPAL CORPORATIONS— Negligence.—A board of commissioners, incorporated as a municipal agency to furnish a city with water, and not having power to levy taxes indefinitely, but only an equitable water-rate, is not liable for injuries received from the negligence of its servants.—*O'Leary v. Board of Fire & Water Com'rs.*, Mich., 44 N. W. Rep. 608.

150. MUNICIPAL CORPORATIONS — Elections. — Where there is a tie in the election for mayor between the incumbent and another candidate, and the city council fails to choose one of them for mayor by lot, as required by the city charter, equity will not interfere to restrain the incumbent from exercising the functions of the office.—*Huels v. Hahn*, Wis., 44 N. W. Rep. 507.

151. MUNICIPAL CORPORATION—Defective Sidewalks — Notice.—Where a plank sidewalk, fourteen years old, is repaird by the town authorities by replacing some of the boards with new ones, leaving untouched the stringers on which such boards were laid, the town is chargeable with notice that such stringers were so rotten that they would not hold the nails by which the boards were fastened to them. — *Town of Wheaton v. Hadley*, Ill., 23 N. E. Rep. 422.

152. MUNICIPAL CORPORATION— Negligence—Evidence. —In an action against a city for damages caused by discharges from an unskillfully constructed sewer, the value of the premises of plaintiff before and after the alleged wrong cannot be shown as a means of ascertaining the amount of damages, as it is not to be presumed that the city will always maintain the sewer in a defective condition.—*City of Nashville v. Comer*, Tenn., 12 S. W. Rep. 1027.

153. MUNICIPAL CORPORATION— Public Improvements. —Under Rev. St. Ill. ch. 24, art. 9, § 19, an ordinance providing for a box drain two miles long, in which shall be set certain pieces of lumber, "not more than four feet" apart, which does not designate the territory to be drained, nor make any provisions for openings in the drain, except at the ends, is insufficient to warrant an assessment on land adjoining such drain. — *Village of Hyde Park v. Carton*, Ill., 23 N. E. Rep. 590.

154. MUNICIPAL CORPORATION—Street Assessments. — Under Rev. St. Ind. § 3165, which provides for an appeal

from a street assessment, on which appeal the transcript of the proceedings is made the complaint, and declares that no question of fact shall be tried which may arise prior to the making of the contract for the improvement, where the transcript shows jurisdiction, no question of fact can be tried which arises prior to the making of the contract for the work, nor will any defect or irregularity which occurred prior to that time affect the right of the contractor to enforce collection of the assessment.—*Sims v. Hines*, Ind., 23 N. E. Rep. 515.

155. MUNICIPAL CORPORATIONS — Defective Sidewalks. —A municipal corporation has power to license the use of its streets by a street-railroad company engaged in transporting passengers in horse-cars, and is not liable for the negligence of its licensee.—*Michigan City v. Boeckling*, Ind., 23 N. E. Rep. 518.

156. MUNICIPAL CORPORATIONS— Contract. — Where a city, by an ordinance, contracts with a water company for a supply of water, and for the use of a number of hydrants, for the purpose of extinguishing fires, such hydrants to be paid for by the levy of a special tax, there is no privity of contract between a tax-payer and the water company. — *Becker v. Keokuk Water-Works*, Iowa, 44 N. W. Rep. 694.

157. MUNICIPAL CORPORATIONS—Taxation.—Article 8, § 6, of the charter of the city of Mt. Sterling, providing that "all property not exempt from taxation under the general laws of this State shall be subject to taxation, as herein mentioned, for city purposes," embraces choses in action.—*Trimble v. City of Mt. Sterling*, Ky., 12 S. W. Rep. 1066.

158. NEGLIGENCE—Street-car.— The driver of a street-car should be in a place and in a condition to exercise a reasonable degree of care and vigilance in watching and observing the street ahead of him, so as to prevent collisions, and avoid injury to pedestrians, children as well as adults, who may be upon the public way.—*Anderson v. Minneapolis St. Ry. Co.*, Minn., 44 N. W. Rep. 518.

159. NEGLIGENCE— Evidence. — In an action for personal injury caused by the fall of an elevator belonging to defendant, evidence that after the accident defendant supplied the elevator with an air-cushon, to prevent injury from similar falls, is inadmissible.—*Hodges v. Percival*, Ill., 23 N. E. Rep. 423.

160. NEGLIGENCE— Evidence. — In an action for a defective crossing it appeared that as plaintiff was driving his load of straw off of platform scales on a curve, and cramping the wagon, a hind wheel was forced into a hole, and the load upset: *Held*, that defendant could show that on the next day, as the wagon was being turned when loaded, the bolster dropped down behind the hound, nearly causing the upsetting of the wagon, as tending to show a defect contributing to the accident.—*Hoyt v. New York, etc. R. Co.*, N. Y., 23 N. E. Rep. 565.

161. NEGOTIABLE INSTRUMENT—Time of Payment.— A note "payable at convenience, and upon this express condition, that I am to be the sole judge of such convenience and time of payment"—does not contemplate that the money shall become due only at the pleasure of the maker, without regard to lapse of time or the rights of the payee, but that maker is to have a reasonable time, to be determined by himself, in which to pay the note. — *Smithers v. Junker*, U. S. C. C. (Ill.), 41 Fed. Rep. 101.

162. NEGOTIABLE INSTRUMENTS—Indorsement.—Where a negotiable promissory note is transferred, before due as collateral security for a loan then made, and received by the indorsee without notice of any defense existing against it in the hands of the indorser, he is entitled to be treated as a *bona fide* holder, and protected at least to the extent of the loan. — *Helmer v. Commercial Bank* Neb., 44 N. W. Rep. 482.

163. NEGOTIABLE INSTRUMENTS.— An instrument reading as follows: "Chicago, March 5, 1887. On July 1st, 1887, we promise to pay D or order, the sum of three hundred dollars, for the privilege of one framed advertising sign" in one end of a certain number of the street-cars of the North Chicago City Railway Co., for a term of three months from May 15, 1887,—is a negotiable promissory note.—*Siegel v. Chicago, etc. Bank*, Ill., 23 N. E. Rep. 417.

164. NOTARY PUBLIC—Contempt.—Rev. St. Ill. 1889, ch. 51, § 36, which authorizes the circuit court to punish summarily, as in cases of contempt, a refusal to obey a subpœna issued by a notary public, is in conflict with Const. Ill. art. 2, § 9, which preserves trial by jury in all criminal cases, since such refusal is not a contempt of the circuit court.—*Puterbaugh v. Smith*, Ill., 23 N. E. Rep. 428.

165. NUISANCE—Dangerous Buildings.—It is not necessary to serve notice, in order to recover damages for injuries received from a falling building, on the owner of its dangerous condition. He is bound to know the condition of his property. Ignorance of its condition can be no excuse for any accident caused by its weakness.—*Tucker v. Illinois, etc. R. Co.*, La., 7 South. Rep. 124.

166. OFFICER— Removal — Appeal. — Pen. Code Cal. § 770, which provides that a judgment of removal from office is appealable like a judgment in a civil action, but pending appeal the office must be filled as in case of a vacancy, defendant being suspended therefrom until reversal, applies to removals of public officers by summary proceedings, under § 772.—*Woods v. Vardum*, Cal., 23 Pac. Rep. 137.

167. OFFICERS—Eligibility. — Under Const. Ind. art. 2, § 10, the right of a person to hold an office is not affected by his ineligibility at the time of his election, but the disqualification must exist at the time the term of office begins.—*Brown v. Goben*, Ind., 23 N. E. Rep. 519.

168. PARTIES — Principal and Agent. — An agent who makes a contract for his principal, in the principal's name, is a person with whom the contract is made, within Mansf. Dig. Ark. § 4936, providing that a person with whom, or in whose name, a contract is made, for the benefit of another, may bring an action without joining with him the person for whose benefit it is prosecuted. — *Ferguson v. McMahon*, Ark., 12 S. W. Rep. 1070.

169. PARTIES — Riparian Rights. — In an action by a riparian owner to enjoin the defendants from taking water from the river for the use of a mill, other adjoining riparian owners are not necessary parties "to a complete determination of the questions involved," within Rev. St. Wis. § 2603, nor are they within § 2604, which provides that "those who are united in interest must be joined as plaintiffs or defendants."—*Kaukauna, etc. Co. v. Green Bay, etc. Co.*, Wis., 44 N. W. Rep. 638.

170. PARTNERSHIP — Assignment. — An assignment of the assets of a general partnership, consisting wholly of personal property, for the benefit of the partnership creditors, when expressed to be made by the firm, and signed in the firm name by one of the partners, is not void on its face. — *Hooper v. Baillie*, N. Y., 23 N. E. Rep. Rep. 569.

171. PARTNERSHIP—Admissions.— On trial of an action for goods sold and delivered, where both defendants have answered separately by general denial, the statement of one that the other was a partner is admissible, against the one making the declaration. — *Vannoy v. Klein*, Ind., 23 N. E. Rep. 526.

172. PARTNERSHIP—Sale.— One who agrees to buy the interest of a partner in a firm business, and also the partner's interest in the leased premises occupied by the firm, is not discharged from paying the agreed purchase price by the fact that the extent of the interest which the purchaser will take under the executed bill of sale is uncertain.— *Schurtz v. Romer*, Cal., 23 Pac. Rep. 118.

173. PARTNERSHIP — Dissolution. — Plaintiff and her brother testified that she and defendant had purchased a vessel together, and had agreed to run it in partnership; and defendant testified that he had made no

partnership agreement with plaintiff, and that she had merely loaned money to her brother to purchase an interest in the vessel; and it appeared that the bill of sale of the vessel was to plaintiff and defendants: *Held*, that the partnership was established. — *Groth v. Payment*, Mich., 44 N. W. Rep. 611.

174. PATENTS—Evidence. — The lines described in a patent must be located by the court according to the calls of the patent. Witnesses can testify only as to the existence and condition on the ground of what is called for in the writing; and it is error to admit their opinions, speculations, or conjectures as to the location of the lines. — *Tognazzini v. Morganti*, Cal., 23 Pac. Rep. 138.

175. PRINCIPAL AND SURETY—Release.—The giving and accepting of a promissory note for a prior debt will not be regarded as a payment thereof, unless there be an agreement of the parties to that effect.—*Bank of Monroe v. Gifford*, Iowa, 44 N. W. Rep. 558.

176. QUO WARRANTO— Procedure. — In an action upon an information in the matter of *quo warranto*, wherein it is claimed that the relator and plaintiff was elected to the office of county attorney, and the defendant had during the term intruded and usurped said office: *Held*, that the provisions of the election law entitled "Contesting Election" are cumulative, and are not an exclusive remedy.—*State v. Frazier*, Neb., 44 N. W. Rep. 471.

177. RAILROAD COMPANIES—Killing Stock.—Code Iowa, § 1289, provides that "the operating of trains upon depot grounds necessarily used by the company and public, where no fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence, and render the company liable under this section:" *Held*, that in order to enable the owner of stock injured beyond the limits of the depot grounds, to recover under this section, it must appear that the stock were upon the depot grounds, and, by reason of the excessive speed of the train, were driven therefrom to another portion of the track, and injured.— *Story v. Chicago, etc. Ry. Co.*, Iowa, 44 N. W. Rep. 690.

178. RAILROAD COMPANIES—Negligence.—Two parallel street car tracks were so near together that cars going in opposite directions would pass within two feet of each other, The cars were operated by steam-power (cable-cars): *Held*, negligence for one after dark to deliberately stand between the tracks, wait for and attempt to take passage on cars coming on one track, at the same time paying no attention to see whether cars were approaching with dangerous proximity on other track.—*Miller v. St. Paul, etc., Ry. Co.*, Minn., 44 N. W. Rep. 533.

179. RAILROAD COMPANIES—Fires.—A charge that railroad companies are to use such diligence in keeping the right of way free from combustible material as prudent and cautious "persons" would under like circumstances, is not erroneous where negligence in a railroad company is defined to be the absence of such care as prudent, cautious, and skilful "railroad men" would use under similar circumstances.—*Rost v. Missouri Pac. Ry. Co.*, Tex., 12 S. W. Rep. 1131.

180. RAILROAD COMPANIES—Accidents at Crossings.—A charge to the effect that the failure to comply with the requirements of Rev. St. Tex. 1879 Art. 4232, at the crossing at which plaintiff was injured was *prima facie* evidence of negligence, making the company liable for the injury if it occurred without any fault of plaintiff, is correct.—*Gulf, etc. Ry. Co. v. Breitling*, Tex., 12 S. W. Rep. 1121.

181. RAILROAD COMPANIES— Injuries—Negligence.—In an action against a railroad company for the killing of plaintiff's son, where, under the law, recovery could be had only in case of gross negligence, a charge which authorizes the jury to believe that the injury was caused by the gross negligence of the company's employees, if they could have avoided it by the use of ordinary care and caution," is fatally defective.—*Missouri, Pac. Ry. Co. v. Brown*, Tex., 12 S. W. Rep. 1117.

182. RAILROAD COMPANIES — Mechanics' Liens. — Act Ind. March 6 1883, provides that contractors, subcontractors, and laborers, who shall furnish material or perform labor for any railroad corporation whose road is not in operation over the whole line thereof, in the way of grading, building embankments, or making excavations for the track, or building or repairing bridges or trestle-work, shall have a lien on such grading, embankment, or excavation, and on such bridges or trestle-work as they may have built or repaired: *Held*, that it was the intent of the legislature to give a lien on the railroad, and not on mere parcels of it.—*Midland Ry. Co. v. Wilcox*, Ind., 23 N. E. Rep. 506.

183. RAILROAD COMPANIES—Stock Killing.—The failure to fence a railroad track, at a point some distance from the depot, is not excused by proof merely that some freight was received and discharged at the place in question.—*Moser v. St. Paul, etc. R. Co.*, Minn., 44 N. W. Rep. 530.

184. RAILROAD COMPANIES—Stockholders.—Where the rights and powers of a railroad company are those of a stockholder only, in a connecting railroad company, the railroad company on account of being a stockholder, is not liable for the negligence of the connecting railroad.—*Atchison, etc. R. Co. v. Cochran*, Kan., 23 Pac. Rep. 151.

185. REAL-ESTATE AGENTS—Commissions.—In an action to recover commissions on the sale of property, when there is a conflict of testimony as to plaintiff's having brought defendant and purchaser into relations of dealing, it is not error to instruct the jury that plaintiff cannot recover unless he procured a customer ready and willing to enter into a contract on defendant's terms, whether those which were originally fixed, or such as defendant found acceptable.—*Schribner v. Hazeltine*, Mich., 44 N. W. Rep. 618.

186. RELIGIOUS SOCIETIES—Explusion of Members.—A church organization may make rules by which the admission and expulsion of its members are to be regulated, and the members must conform to these rules. If, however, it has no rules on the subject those of the common law prevail; and, before a member can be expelled, notice most be given him to answer the charge made against him, and opportunity offered to make his defense, and an order of expulsion without such notice and opportunity is void.—*Jones v. State*, Neb., 44 N. W. Rep. 658.

187. REPLEVIN—Practice.—Where a replevin writ has been, by mistake, levied on property to which plaintiff has no claim, but which is of like description as that mentioned in the writ, the defendant, upon waiving the return of the property, is entitled to a verdict for its value, and is not remitted to a separate action.—*Dewey v. Hastings*, Mich., 44 N. W. Rep. 607.

188. SALE—Delivery.—When goods are ordered, and they are sent before the time specified in the order, the buyer waives the objection that they are prematurely sent by receiving them and not objecting within a reasonable time.—*Sole Leather Over Manuf'g Co. v. Bangs*, Minn., 44 N. W. Rep. 671.

189. SALE — Delivery. — Where a person purchases wood, and orders it to be cut and delivered to a third person, but afterwards countermands the order, he cannot be held liable if the seller allows such third person to take the wood.—*Todd v. Everett*, Mich., 44 N. W. Rep. 583.

190. SALES—Rescission.—Sellers of goods cannot seize them for the purchase money, and Mansf. Dig. Ark. ch. 96, relating to liens, where the goods are in possession of the sheriff under execution before any claim of lien is asserted. Nor can they rescind the contract of sale because of the purchaser's fraudulent representations as to his solvency at the time thereof where they have pressed their claim to judgment with knowledge of the purchaser's fraud.—*Bryan & Brown Shoe Co. v. Block*, Ark., 12 S. W. Rep. 1073.

191. SALE—Warranty—Where plaintiff had no opportunity to inspect the machinery sold, and defendant knew the purposes for which it was required, there is an implied warranty that it shall be fit for such purposes; such implied warranty not being inconsistent with, or excluded by, the express agreement in the contract that the machinery should be of a certain power, and in good order, except from exposure to the weather. *Blackmore v. Fairbanks, Morse & Co.*, Iowa, 44 N. W. Rep. 548.

192. SALE— Warranty.— Where personal property is sold with a warranty, the purchaser when sued for the price, may recoup damages arising from a breach of the warranty though the sale was executory, and he kept the property after ascertaining the defect.—*Underwood v. Wolf*, Ill., 23 N. E. Rep. 598.

193. SALE—Title.—An understanding or agreement between a vendor and vendee, entered into when they commenced to take the inventory of the goods sold, that the inventoried goods should belong to the vendee, "to do with as he pleased" in respect to the matter of selling to customers, does not clearly imply a waiver of the stipulation, in a written contract between the parties, that the vendor should retain title until the goods are paid for.—*Stone v. Waite*, Ala., 7 South. Rep. 117.

194. SALES—Agents—Acceptance.—Where an agent in New Orleans, for non-resident dealers, has authority only to exhibit samples and receive orders, which he communicates to his principal for acceptance or rejection, *held*, that an order so transmitted was similar in every respect to an order to purchase sent direct by the buyer to the seller, and when accepted and filled, and the goods delivered to the carrier, and insured by the buyer, that it was a contract.—*Claflin v. Meyer*, La., 7 South Rep. 139.

195. SCHOOL-DISTRICTS—Contracts.—Code Iowa, § 1723, confers upon the school directors no authority to contract with one who is not the lowest bidder, and does not furnish the bonds required, and hence the acceptance of his bid does not constitute a contract.—*Weitz v. Independent District of Des Moines*, Iowa, 44 N. W. Rep. 696.

196. SCHOOL-DISTRICTS — Division and Annexation.—To give a county superintendent of schools jurisdiction to detach a part of the territory of a school-district, and attach the same to an adjoining district, a petition in writing duly signed, must be presented to him for that purpose; and an oral request to perform such acts is not sufficient.—*State v. Compton*, Neb., 44 N. W. Rep. 660.

197. SET-OFF—Pleading.—Where a defendant pleads as set-off a debt due from a third person, alleging that such person is the real owner of the note sued on, and the plaintiff, instead of demurring, replies by denying the allegation of ownership, the validity of the plea cannot be questioned by a motion "to exclude all the defendant's testimony as not establishing a defense," since the only issue made by the pleadings is that as to the ownership of the note. — *Rothschild v. Bruske*, Ill., 23 N. E. Rep. 419.

198. SHERIFF— Qualification.— The mere fact that a sheriff knew that he was liable to be called as a witness on defendant's trial for keeping a bawdy-house, and that he had knowledge of the facts which would make against defendant if he should be called, does not disqualify him from serving a special *venire* there being nothing to show that he was hostile towards, or felt any prejudice against, defendant.— *Sullivan v. State*, Wis., 44 N. W. Rep. 647.

199. SPECIFIC PERFORMANCE—Description.—Defendant agreed to convey, for a gross sum, 49 acres of land, with the buildings thereon "said described property being the same now occupied by me." The land was all in one tract, and was inclosed. It lay beside the road which plaintiffs had traveled for years. The contract was written by plaintiffs prior to the time of its execution. The evidence showed that, if defendant made any statement as to the number of acres, she did not do it with any purpose or intent to guaranty that the tract contained that number of acres: *Held*, that the reference to the number of acres was only for the purpose of description, and was a mere estimate, and that plaintiffs were not entitled to any abatement from the purchase price by reason of any deficiency in the number of acres.—*Docter v. Furch*, Wis., 44 N. W. Rep. 648.

200. SPECIFIC PERFORMANCE — Contract. —An agreement for the sale exchange, or conveyance of real property is sufficient, if it contains the essential terms of the contract, expressed with such certainty that they may be understood from the instrument itself. The legal principle that contracts must be mutual does not mean that each party must be entitled to the same remedy for a breach by the other. There must be mutuality of obligation, but not, necessarily, mutuality of remedy.—*Brown v. Munger*, Minn., 44 N. W. Rep. 519.

201. SUMMONS—Service by Private Individual.—Under How St. Mich. § 7074, providing that a justice may on the request of a party, by authority indorsed on the process, empower a proper person of lawful age, and not a party or interested, to execute it, the request of the party and the fitness of the appointee must appear on the indorsement.—*Gadsby v. Stimer*, 44 N. W. Rep. 606.

202. TAXATION.—A suit to set aside a tax as illegal and void may be maintained, though the Michigan tax law provides for a proceeding in which the land owner may contest the validity of the tax; that law not in terms repealing, nor in any manner amending, 2 How. St. Mich. § 6626 authorizing suits to quiet title.—*Lake Superior Ship, Canal, etc. Co. v. School Dist. No. 1*, Mich., 44 N. W. Rep. 616.

203. TAXATION—Railroad Companies.—A railroad cannot be taxed by a county to pay the subscription of the county to aid in its construction. And in matters not that the county issued bonds in payment of the subscription and the tax is to pay the bonds.—*Louisville, etc. R. Co. v. Commonwealth*, Ky., 12 S. W. Rep. 1064.

204. TAX-SALES—Redemption.—A notice of the expiration of the time for redemption from a tax-sale considered as showing the amount for which the land had been sold, the amount of the tax, penalty, and interest, for which the land was sold, being stated, and also that that sum, with interest and subsequent taxes, the amount being stated, was required to be paid to redeem. —*Robert v. Western Land Ass'n*, Minn., 44 N. W. Rep. 668.

205. TRIAL— Findings — In all actions tried by the court, there must be a general finding, and, when requested by one of the parties, a special finding, and, if the finding be vague, uncertain, or indefinite, it will not sustain the judgment. — *Foster v. Devinney*, Neb., 44 N. W. Rep. 479.

206. TROVER AND CONVERSION.—Plaintiffs shipped defendant 5,000 cigars upon an agreement that he "could take what he wanted at $35 per thousand," and he elected to take 2,000, and packed away the remaining 3,000, which were appropriated by the public during the yellow fever epidemic, when the defendant was absent from the city: *Held*, that an action of trover would not lie against defendant.—*Traylor v. Hughes*, Ala., 7 South. Rep. 159.

207. TRUSTS—Trustee. — Where a will "gives, devises, and bequeaths to S and H in trust for the benefit of" a certain church, a sum of money, and directs that they or their successors shall invest the money safely for the benefit of said church, S and H take the money as legatees, but being charged with the trust of carrying out the testator's purposes in regard thereto, they are trustees to the extent that on their refusal to act, others may be appointed by virture of the power and duty of courts of equity to see that no trust shall fail for want of a trustee.—*In re Petranek's Estate*, Iowa, 44 N. W. Rep. 685.

208. TRUSTEE—Brokers.—In the absence of any specific agreement therefor, a broker who procures for a

trustee a loan for the benefit of the trust-estate has no lien on such estate for his commission, his remedy being against the trustee personally. — *Johnson v. Lehman*, Ill., 23 N. E. Rep. 435.

209. VENDOR AND VENDEE — Bona Fide Purchasers.— Though Code Iowa, § 1941, provides that no instrument affecting real estate shall be of any validity as against subsequent purchasers, for valuable consideration, without notice, unless recorded, etc., an unrecorded bond for title takes precedence of a subsequent quit-claim deed, since the grantee therein cannot be regarded as a purchaser without notice. — *Steele v. Sioux Valley Bank*, Iowa, 44 N. W. Rep. 564.

210. VENDER AND VENDEE — Waste. — A vendor who sells land, retaining the title as security for the purchase money, sustains the same relation to the vendee, so far as the question of security is concerned, as does a mortgagee to a mortgagor, and, if the security of the land is insufficient, may restrain the vendee from cutting timber on the land. — *Moses v. Johnson*, Ala., 7 South. Rep. 146.

211. VENDOR AND VENDEE —Defective Title.—To make a title to real estate unmarketable, so that specific performance of a contract to convey will not be enforced against the vendee, there must be a reasonable doubt as to its validity. If the doubt raise a question of law, it must be a fairly debatable one,—one upon which the judicial mind would hesitate before deciding it. If the doubt depend on a matter of fact, and there is no doubt as to how the fact is, and if it may be readily and easily shown at any time, it does not make the title unmarketable. — *Hedderly v. Johnson*, Minn., 44 N. W. Rep. 527.

212. VENDOR AND VENDEE—Title.—A vendor who fails to convey land according to contract, because the owner has failed to convey it to him as agreed, is liable to his vendee for the latter's expense in examining the title, though the vendee knew, when the contract was made, that the vendor had not yet acquired title. — *Northridge v. Moore*, N. Y., 23 N. E. Rep. 570.

213. VENDOR AND VENDEE. — A vendee in possession under bond for title may sue for the destruction of his crops, caused by vendor's overflowing the land. — *Connally v. Hall*, Ga., 10 S. E. Rep. 738.

214. VENDOR'S LIEN ON CROPS. — The express lien which a vendor of land reserves on the crops for the year when the purchase money shall become due, attaches as soon as the vendee acquires title to the crops, and a subsequent mortgagee thereof without notice, who converts the crops, is liable to the vendor to the extent of his lien. — *Williams v. Cunningham*, Ark., 12 S. W. Rep. 1072.

215. VENDOR'S LIEN—Waiver.— Upon an exchange of real estate between plaintiff and defendant, it was agreed that defendant, besides paying off an incumbrance on his own property, and assuming one on that of plaintiff, should pay a sum of money as part of the consideration for the exchange. This money was never paid, but, with various other items, was made the basis of a settlement between the parties, upon which a balance was found to be due plaintiff, and defendant gave his notes therefor: *Held*, that plaintiff by allowing the purchase money to be blended in a settlement with other items, is presumed to have waived his right to a lien therefor, and to rely exclusively upon the personal responsibility of the vendee. — *Erickson v. Smith*, Iowa, 44 N. W. Rep. 681.

216. VENDOR'S LIEN—Transfer.—Under Code Ala. 1886, § 1764, the transfer of a purchase money note, by delivery merely, does not pass the legal title, and the payees are still necessary parties to a bill to enforce the lien.—*Davis v. Smith*, Ala., 7 South. Rep. 159.

217. WATERS—Negligence.—The complaint stated that defendants dug and excavated the street and sidewalk of the public street in front of and adjoining the premises occupied by plaintiff in such a manner as to allow the rain and water to accumulate and flow into the adjoining premises of plaintiff, and cover and damage his merchandise: *Held*, that there was a sufficient showing of negligence to sustain the complaint on general demurrer.—*Durginv. Neal*, Cal., 23 Pac. Rep. 133.

218. WATER-RIGHTS.—One who actually appropriates water without complying with the rules prescribed by Civil Code Cal. §§ 1415, 1416, acquires the right to its use as against any subsequent claimant who has not complied with the rules. — *Burrows v. Burrows*, Cal., 23 Pac. Rep. 146.

219. WILLS—Construction.—Testatrix bequeathed all her property in trust, and provided by her will that the income of the property should be applied to the use of her husband during his life, "except that (the trustees) shall apply to the use of D the sum of $1,000 per annum during the life-time of my said husband; and from and after the decease of my said husband the sum of $2,000 per annum." After the death of the husband, the income was for several years insufficient to pay the whole amount of the annuity, but afterwards became more than sufficient: *Held*, that such surplus should be first applied to pay the deficiencies in the payments of former years, before it could be applied for distribution among the next of kin.—*In re Channcey*, N. Y., 23 N. E. Rep. 448.

220. WILLS—Vesting of Estate.—Under a will by which the testator directs that his land "be reserved for his children, and be equally divided among them when the youngest attains the age of twenty-one years," and devises the land to his executors in trust during the minority of his children, title does not vest in the children until the youngest becomes twenty-one years old.—*Kingman v. Harmon*, Ill., 23 N. E. Rep. 430.

221. WILLS—Construction.—Under a will by which the testatrix, after bequeathing certain legacies, gave "all the rest, residue, and remainder" of her estate, both real and personal, to her executors, in trust, to pay the income to her sister for life, and then distribute the principal among several charities, land inherited by the testatrix from such sister after the execution of the will passes as residuary estate.—*Woman's Union Missionary Soc. v. Mead*, Ill., 23 N. E. Rep. 603.

222. WILLS— Probate. — Where the signatures of the testator and the subscribing witnesses, also deceased, are proved, and the provisions of the will are such as the testator would be likely to make, the fact that one of the subscribing witnesses, who drew the will, kept it concealed for years after the testator's death, and denied that it had been made, will not prevent the will from being admitted to probate.—*In re Hesdra's Will*, N. Y., 23 N. E. Rep. 555.

223. WILLS—Election.—Where all the acts of a devisee tending to show an election taken under the will occur before she knows that she has any other title to the land, no election is implied.—*Clark v. Hershey*, Ark., 12 S. W. Rep. 1077.

224. WITNESS—Interpreter—Competency. — An interpreter, otherwise unobjectionable, is not rendered incompetent to interpret the testimony of a foreign witness by the fact that he has himself testified in the case.—*Chicago, etc. R. Co. v. Shenk*, Ill., 23 N. E. Rep. 436.

225. WITNESS— Transactions with Decedents. — Upon suit on a contract made with defendant's agent, it was stipulated that the stenographic report of the agent's testimony at a former trial might be read as a deposition. Before the second trial the agent died, and the plaintiff at that trial offered the report of his testimony taken at said former trial: *Held*, inadmissible, under Rev. St. Ill. ch. 51, § 4.— *Trunkey v. Hedstrom*, Ill., 23 N. E. Rep. 587.